IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
RESPONDENT,	)	
	)	
vs.	)	**No. SC84214**
	)	
LEWIS E. GILBERT,	)	
	)	
APPELLANT.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CALLAWAY COUNTY
THIRTEENTH JUDICIAL CIRCUIT
THE HONORABLE GENE HAMILTON, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

DEBORAH B. WAFER, MO BAR NO. 29351
OFFICE OF THE PUBLIC DEFENDER
1221 LOCUST STREET; SUITE 410
ST. LOUIS, MISSOURI 63103
(314) 340-7662 - TELEPHONE
(314) 340-7666 - FAX

ATTORNEY FOR APPELLANT

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JURISDICTIONAL STATEMENT

A Callaway County jury convicted appellant Lewis E. Gilbert of two counts of first degree murder, §565.020, RSMo. 1994, and assessed sentences of death.[1] In accordance with the jury's verdict, the trial court, the Hon. Gene Hamilton, imposed sentences of death. This Court has jurisdiction. Art. V, Sec. 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

The evidence adduced at the guilt phase of trial showed the following:

On August 29, 1994, Lewis Gilbert and Eric Elliott left Ohio, en route to California, in a car belonging to Ruth Loader (T678-80,683-85,689-94,926)[2]. Eric was worried about a pending court appearance on a burglary charge (StEx 43).

According to the testimony of New Mexico State Officer Daniel Becker,[3] who interviewed Lewis after his arrest, and to Lewis' own testimony, Eric and Lewis drove Ruth Loader's car to Callaway County, Missouri, where it got stuck in a field near the home of Flossie and William Brewer (T863-64,909). Planning to steal the Brewers' car and money, Eric and Lewis went to the Brewers' house and asked to use the phone

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1 Statutory references are to RSMo 1994 unless otherwise noted; Lewis was also convicted of first degree burglary, armed criminal action, stealing, and first degree tampering (LF240-45,324-26).

2 Citations to the Record are as follows: T- Trial Transcript; LF -Legal File; StEx - State Exhibit at trial; StMtnEx - State Exhibit at motion hearing; DefEx - Defense Exhibit at trial; DefMtnEx - Defense Exhibit at motion hearing.

3 Hereinafter, "Becker."

(T863-64,908). After being admitted to the house, and after speaking to the Brewers for as long as thirty minutes, Eric or Lewis pulled out the .22 and tied Mrs. Brewer's hands behind her back with a telephone cord (T864,908-10). They took Mr. and Mrs. Brewer into the basement where Eric shot them (T864,911-12). Eric found keys, money, and several rifles; he and Lewis took these things and left in the Brewers' car (T865-66, 910-13).

In Oklahoma City, Eric and Lewis stopped at a recreational area called Draper Lake (T720-21). When they left Draper Lake, Eric and Lewis were in a vehicle owned by Roxy Ruddell; the Brewers' car was later found at Draper Lake (T719-29, 771-73). In New Mexico, alerted by a man who had picked up two hitchhikers, the State Police found Lewis and Eric -- asleep in a culvert alongside a state road near Santa Fe -- and arrested them (T777-80,788-89). Ruddell's vehicle was nearby (T771-73,800-02;StEx's55&56).

Officer Becker questioned Lewis following his arrest (StMtnEx's2&4;T848-84). Overruling defense objections (T854,1032-33), the trial court admitted, at guilt phase, evidence of Lewis' statements to Becker concerning the charged Missouri offenses (T854-84).[4]

At penalty phase, defense objections notwithstanding, Becker testified to statements Lewis made concerning offenses in Ohio and Oklahoma (T1033-43). In Ohio, Lewis and Eric stole a car belonging to Ruth Loader after Lewis shot her with a .22 Eric had taken from his father (T1039-41;StEx43). In Oklahoma, they saw Roxy Ruddell fishing at

[4] Detailed facts concerning Lewis' statements will be presented in the argument.

Draper Lake and decided to steal her vehicle so the police could not follow their trail (T1035). Lewis shot her with the .22, then he and Eric took her vehicle and continued towards California (T1037).

During death qualification voir dire, the trial court sustained the state's objection when defense counsel attempted to ask the jurors about statements they had made regarding the death penalty (T411-14).

At guilt phase, overruling defense objections that this violated the Notes on Use because there was no evidence that Lewis shot the Brewers, the trial court gave the jury verdict directors for first degree murder that posited "the defendant [Lewis] or Eric" as the shooter (T964-66;LF201,205).

Prior to trial, the defense moved to preclude the state from seeking the death penalty or quash the Information because the state failed to comply with ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), and ***Jones v. United States***, 526 U.S. 227 (1999); the trial court denied this motion (T175-76;LF27,175-78).

Another motion moved to preclude the state from seeking the death penalty because records from Lewis' childhood had been destroyed by Oklahoma preventing the defense from obtaining and presenting mitigating evidence in defense of the state's case for death; the trial court overruled the motion (LF157-60;T1016-17;DefExL).

At penalty phase, in addition to Becker's testimony concerning Lewis' confessions to shooting Ruth Loader in Ohio and Roxy Ruddell in Oklahoma (T1031-43), the state presented testimony and photographs describing the discovery and condition of Roxy Ruddell's body when found and evidence of Lewis' Oklahoma murder conviction (T1046-

54;StEx's 84-86). There was testimony that Ruth Loader has not been seen since August 29, 1994, and her body had never been found (T1070-75,1081-85).

In mitigation, the defense presented testimony from Lewis' family, a former foster parent (T1103-1176), and expert witnesses (T1177-1276).

Lewis' mother, Yvonne Mall, testified that her husband, Joe, was very abusive (T1105-06). Lewis knew about the abuse, and would wake at night, screaming, and begging Yvonne to make Joe leave (T1108). Yvonne suspected Joe was abusive towards Lewis (T1109).

Lewis' older sister, Lisa, testified that Joe abused all the children but abused Lewis the most (T1148-49). The abuse was physical, verbal, and emotional (T1149). When Lewis was three, Joe left (T1112).

Lewis was hyperactive and had severe asthma (T1109-10,1151). Once, Lewis had a serious asthma attack and turned blue, lost consciousness, and stopped breathing (T1114-15). Yvonne drove Lewis to the doctor who injected adrenaline into Lewis' chest because his heart had stopped (T1116).

After this, Lewis became quieter, more withdrawn, and serious (T1117,1151). He rarely laughed or smiled (T1117). He began having problems with speech and development (T1118). He was "slower to catch on to things" and "much slower thinking" (T1118). He was clumsier, not as playful, and had many accidents (T1118,1151). In second or third grade Lewis was put in special education classes (T1118-19).

When Lewis was six, Yvonne married Mike Rowan (T1119). Six months later, Yvonne found out that Mike was abusing Lewis and another of her children (T1120-21).

Mike once beat Lewis so badly that one "side of his face was just a solid bruise, and his eye was puffing up, and his nose was bleeding, and his lip was all swollen and busted" and bleeding (T1123,1154-55). Yvonne made Mike leave (T1124).

Within a year of his asthma attack, Lewis began stealing (T1126). He had problems with anger and would yell, scream, and throw things (T1127). Lewis had problems with his siblings, other kids, and his teachers; they shunned him because of his behavior (T1129,1157).

When Lewis was ten, he broke into someone's home and was sent to Cookson Hills Christian School by the juvenile court (T1130). Carla Wagner and her husband were Lewis' first house parents at Cookson Hills (T1168). Lewis was "easily taken advantage of" by other kids, and had problems with bed-wetting (T1170-71).

Learning was a challenge for Lewis, but he was never a threatening person (T1172). Lewis was "the first and only roommate that [Carla's] own son had" (T1172). Carla's son was then about two years old (T1172).

After three or four years, at Cookson Hills, Lewis returned home (T1131-32). Meanwhile, Yvonne had married a man named Werner "Jay" Mall; the marriage was not going well (T1131-32). Jay verbally abused Lewis and made fun of him (T1136,115-60). Jay made Lewis a scapegoat and whenever anything went wrong blamed Lewis (T1136-37). Jay would say, right in front of Lewis, that Lewis "could fuck up a wet dream" (T1160). Eventually Jay went to prison for making counterfeit money (T1138-39).

Lewis continued in special education classes but dropped out of school in the tenth grade and left home (T1139-40).

Neuropsychologist Michael Gelbort evaluated Lewis before trial and determined Lewis had problems with learning, memory, processing information, and thought coordination necessary to plan (T1177-84). Lewis' neuropsychological test scores were in the impaired range (T1184-85).

Dr. Gelbort found that Lewis' scores, personal history (including serious head injuries) indicated he had acquired brain injury affecting his understanding, comprehending, planning ahead, and appreciating the implications of his behavior (T1185-88). Lewis' brain injury was a longstanding, possibly congenital, condition (T1190-91). Lewis suffered from his brain injury at the time of the crime in 1994 (T1191).

Psychologist Rosalyn Schulz also evaluated Lewis Gilbert (T1204-19). She testified that the range for borderline IQ is 84 to 71; Lewis' score at age seven was 84 (T1215). At age fourteen, his score was 82, and school records indicated he was reading at a third grade level (T1215-16).

Dr. Schulz's opinion was that Lewis suffered from an anxiety disorder, borderline intellectual functioning, avoidant personality disorder and schizotypal personality disorder (T1232). As a result, Lewis had concentration and memory difficulties, sleep disturbance, irritability, felt worthless, was easily distracted, disorganized, had difficulty interacting with others, and was prone to rejection (T1232-33).

Human Development and Child Development Specialist Wanda Draper, Ph.D., conducted a developmental evaluation of Lewis (T1247-53). She determined that Lewis' cognitive, psychological, and emotional development was not normal (T1257-71). At the

time of the crime, Lewis was, emotionally, age nine, and "a troubled individual with an accumulation of emotional and social disorders" that began in childhood and continued throughout his life (T1276).

To avoid repetition, further facts will be presented as necessary in the argument.

POINTS RELIED ON

Point One

The trial court erred in sustaining the state's objection and refusing to let defense counsel ask potential jurors during voir dire if they had personally made a statement -- oral or written -- "about the death penalty." This violated Lewis's rights to fair jury trial, due process, freedom from cruel and unusual punishment, and reliable sentencing. U.S.Const.,Amend's V,VI,VIII, and XIV, Mo.Const.,Art.I, §§10,18(a) and 21; it violated §494.470.1 & .2, RSMo.2000 (persons who have "formed or expressed an opinion concerning the matter or any material fact in controversy that may influence" their judgment and "whose opinions or beliefs preclude them from following the law" shall not be sworn as jurors and are "ineligible to serve...") The ruling prejudiced Lewis by preventing him from eliciting facts -- statements prospective jurors had made about the death penalty -- relevant to: determining jurors' true and fixed beliefs and opinions about the death penalty, gauging whether jurors were truly able to follow the law and were qualified to serve in a death penalty case, and intelligently using peremptory challenges. That the court allowed questioning about "articles" jurors had written or "speeches" jurors had given about the death penalty shows that a question about what jurors have said in less formal settings concerning the death penalty is an appropriate, relevant question in a capital trial and authorized by §§494.470.1 & .2. Because few people make speeches or write articles about the death penalty, counsel's ability to obtain information was unreasonably limited. Contrary to the prosecutor's

objection, the question was "material" in that it 1) sought facts "relevant" to determining whether any juror had "formed or expressed an opinion concerning the matter or any material fact in controversy in [the] case...," and 2) provided information the prosecutor, himself, relied on in moving to strike jurors Zacher and Casady for cause. If the state's question -- whether jurors had "preferences," "predispositions," or "reservations" about the penalties -- was "relevant," then seeking facts showing preferences, predispositions or reservations is relevant.

State v. Clark, 981 S.W.2d 143 (Mo.banc1998);

Witherspoon v. Illinois, 391 U.S. 510 (1968);

Knese v. State, No. SC83822 (Mo.banc August 27,2002)

2002 WL 1969388;

State v. McMillin, 783 S.W.2d 82 (Mo.banc1990);

U.S.Const., Amend's V, VI, XIV;

§494.470, RSMo. 2000.

Point Two

The trial court erred in overruling defense objections to the verdict directors -- Instructions 6 and 10 -- attributing the physical conduct (the "conduct element") of shooting the Brewers to "defendant or Eric Elliott." This violated Lewis's rights to due process of law, fair trial by a properly instructed jury, freedom from cruel and unusual punishment, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, XIV; Mo.Const., Art. 1, §§10, 18(a), and 21. It also violated Note 5, Notes on Use to MAI-

CR3d 304.04, and Rule 28.02(f). All the evidence was that codefendant Eric alone shot the Brewers and only Eric committed the conduct elements of the offense. There was no evidence that defendant Lewis Gilbert committed any conduct elements of the offense. Note 5, Notes on Use to MAI-CR3d 304.04, provides that when "the conduct elements of the offense were committed entirely by someone other than the defendant... (1) all of the elements of the offense, including the culpable mental state, should be ascribed to the other person or persons and not to the defendant..." Lewis was prejudiced because these instructions told the jury there was evidence that Lewis shot the Brewers and the court approved the jury finding Lewis shot the Brewers. Without evidence that Lewis shot the Brewers, the instruction improperly authorized the jury to ignore the evidence, find Lewis shot the Brewers, reject the felony murder defense, and reach a verdict based on so-called facts improperly inferred from a disbelief of Lewis' testimony and statements, and their own speculative ideas.

State v. O'Brien, 857 S.W.2d 212 (Mo.banc1993)

State v. Daugherty, 631 S.W.2d 637 (Mo. 1982)

State v. Sparks, 701 S.W.2d 731 (Mo.App.E.D.1985)

State v. Dickerson, 649 S.W.2d 570 (Mo.App.S.D.1983)

U.S.Const., Amend's V, VI, XIV;

MAI-CR3d-304.04, Notes on Use, Note 5;

MAI-CR3d 313.02.

Point Three

The trial court erred in overruling Lewis' motion to quash the information and erred and exceeded its authority and jurisdiction in imposing death sentences on Counts I and II. This violated Lewis' rights to due process of law, to notice of, and to be tried and sentenced only for, the offenses charged, and to freedom from cruel and unusual punishment, U.S.Const. Amend's V, XIV, VI, and VIII; Mo.Const., Art I, §§10, 17, 18(a) and 21; Section 565.030.4(1). Missouri's statutory scheme authorizes a sentence of death only upon a finding of at least one of the seventeen statutory aggravating circumstances comprising alternate elements of the offense of "aggravated first degree murder" and facts of which the prosecution must prove at least one to increase the punishment for first degree murder from life imprisonment without probation or parole to death. The information filed by the state failed to plead any aggravating circumstances as to the two charged offenses of first degree murder thus did not include any facts authorizing enhancement of the sentences to death. The offenses actually charged against Lewis and of which he had notice were unaggravated first degree murders for which the only authorized sentence is life imprisonment without probation or parole. The trial court lacked jurisdiction to sentence Lewis to death, and the death sentences imposed were not authorized. Lewis' sentences of death must be vacated, and he must be resentenced to life imprisonment without probation or parole.

Ring v. Arizona, 122 S.Ct. 2428 (2002)

Apprendi v. New Jersey, 530 U.S. 466 (2000)

Jones v. United States, 526 U.S. 227 (1999)

Harris v. United States, 122 S.Ct. 2406 (2002)

U.S.Const., Amend's V, XIV and VI

Point Four

The trial court erred in overruling Lewis' motion for judgment of acquittal at the close of all evidence and entering judgment against him for first degree murder on counts 1 and 2. This violated Lewis' right to due process of law. U.S.Const., Amend's V and XIV; Mo.Const., Art I, §§10. There was no substantial evidence that Lewis planned to kill the Brewers, or deliberated on killing the Brewers or participated in killing the Brewers. Substantial evidence showed only that Lewis was guilty of second degree murder in that Lewis and codefendant Eric Elliott planned to rob the Brewers, Lewis participated in what he thought would be a robbery of the Brewers, but Eric killed the Brewers. Becker's testimony at trial concerning an insupportable statement in his report -- "that they [Lewis and Eric] decided to kill" the Brewers" -- was an unfounded, conclusory opinion -- not fact -- and contradicted by Becker's testimony that 1) Lewis never said he and Eric planned or discussed killing the Brewers, and 2) Becker's own notes do not contain the statement that "they decided to kill" the Brewers.

State v. O'Brien, 857 S.W.2d 212 (Mo.banc1993);

State v. Taylor, 422 S.W.2d 633 (Mo.1968);

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. Whalen, 49 S.W.3d 181 (Mo.banc2001);

U.S.Const., Amend's V and XIV.

Point Five

The trial court erred in 1) overruling Lewis' motions to preclude the state from seeking death due to the destruction of mitigating evidence and for sentences of life imprisonment, and 2) in imposing death sentences on Counts I and II. This violated Lewis' rights to due process of law, a defense, fundamental fairness, reliable and proportionate sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's V, XIV, VI, and VIII; Mo.Const., Art. I, §§10, 14, 18(a) and 21; Mo.R.S., §565.035.3(3). Factors that undermine confidence in the reliability of these death verdicts, demonstrate their excessiveness, and require they be vacated include: the lack and questionable nature of the evidence supporting Lewis' convictions; the mitigating evidence concerning Lewis himself; the prosecutor's unsupported, misleading, and prejudicial assertion at penalty phase that Lewis was a serial killer; the erroneous exclusion of a qualified juror who did not like the death penalty; the failure to suppress and exclude statements Lewis made that did not clearly refer to himself or the offenses charged in Missouri; Lewis' inability to present a defense at penalty phase as a result of the destruction of records from his early years, and the fundamental unfairness of proceeding in Missouri after Lewis had been illegally extradited from Oklahoma. As a result of the destruction of records from Lewis' formative years, there were aspects of Lewis' life and nature that the jury never heard and could not consider in determining his sentence, and it is impossible for this Court to determine, as required by §565.035.3, "whether the sentence[s] of death [are] excessive or disproportionate to the penalty imposed in

similar cases, considering ... the defendant." Allowing the state to seek death when the defendant was unable, through no fault of his own, to obtain and use records that would have supported him in opposing the death penalty and persuading the jury to assess sentences of life imprisonment violated fundamental fairness. The state legislature has established life imprisonment without probation or parole as an appropriate sentence for an aggravated first degree murder, and the Court may not uphold the sentences of death without considering, as required by the Due Process Clause, whether the less severe punishment of life imprisonment would be adequate to satisfy the state goals.

Cooper Industries, Inc. v. Leatherman Tool

Group, Inc., 532 U.S. 424 (2001);

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996);

Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994);

State v. Chaney, 967 S.W.2d 47 (Mo.banc 1998);

U.S.Const., Amend's V, VIII, and XIV.

Point Six

The trial court erred in overruling Lewis' motions to suppress and exclude his statements, his objections at trial, and admitting -- at both phases of trial -- Officer Becker's testimony concerning his interview with Lewis and statements Lewis made, and plainly erred in allowing the prosecutor to highlight Lewis' silence and failure to make statements in his closing argument. This violated Lewis' rights to due process of law, silence and non-incrimination, freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's V, VIII, and XIV; Mo.Const., Art. 1, §§10, 19, and 21. The state did not prove by a preponderance of evidence that Lewis knowingly, intelligently and voluntarily waived his constitutional rights and that his statements were made knowingly, intelligently and voluntarily. Officer Becker never read or showed Lewis the "waiver" section of the rights waiver form, never asked Lewis to waive his rights, and never asked Lewis to sign the waiver form to indicate he desired to waive his rights. Without notifying Lewis, Officer Becker signed Lewis' name on the waiver form. Lewis' comments show he did not know or understand his right to end the questioning ("I expect to get interrogated"), did not waive his rights and invoked them ("I don't see any point in doing it..." "I don't know, I just need, before I even tell my side of the story, I need to know what I'm up against, you know, how's it going to benefit me or whether it's going to do me harm...") That Officer Becker ended the interview because Lewis refused to talk about the incidents also shows Lewis invoked and did not waive his silence and non-incrimination rights. Officer Becker tricked, and

coerced Lewis to make a statement, after extended questioning, by telling him, "The truth will set you free." Admission of Lewis' statements and of Becker's testimony and the state's argument about Lewis' failure and refusal to talk about the offenses prejudiced Lewis by highlighting his invocation of rights and failure to give statements about the offense.

Miranda v. Arizona, 384 U.S. 436 (1966);

Johnson v. Zerbst, 304 U.S. 458 (1938);

Michigan v. Mosley, 423 U.S. 96 (1975);

State v. Murphy, 467 S.E.2d 428 (N.C.1996);

U.S.Const., Amend's V, VIII, and XIV.

Point Seven

The trial court erred in overruling Lewis' motion for a mistrial made when the assistant attorney general, in his penalty phase opening statement announced: "what we're dealing with here is a serial killer." This violated Lewis' rights to due process of law, fair jury trial, freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. I, §§10, 14, 18(a), and 21. The court's "remedy" of merely telling the jury to disregard the statement was not adequate, and Lewis was prejudiced. This was a veteran prosecutor -- assisting precisely because he was experienced in death penalty cases -- who certainly knew that making this kind of argument in an opening statement was prohibited and would be prejudicial. The timing of the argument enhanced its prejudicial impact: it hit the jury at the very beginning of penalty phase when, for the first time, the state revealed to the jury what facts -- "evidence" -- the state maintained warranted the death penalty. At this opening stage of the penalty trial, the jury would view the assistant attorney general's assertion that Lewis was a serial killer as "fact" and would not, despite the court's instruction, be able to disregard such a statement. The prejudicial force of this statement on the jury is demonstrated further by an article published in <u>The Columbia Daily Tribune</u> after the jury returned verdicts of death; of the entire penalty phase, the article mentioned only two statements made by the assistant attorney general: that the defense experts' testimony was "psychobabble" and that Lewis was a "serial killer." The prejudice caused by this error, and the likelihood

that if this Court does not act to correct the assistant attorney general's improper argument the state will make similar arguments in the future, require that Lewis' sentences of death be vacated and he be re-sentenced to life imprisonment without probation or parole or, in the alternative, that the cause be remanded for a new penalty phase proceeding.

State v. Thompson, 68 S.W.3d 393 (Mo.banc 2002);

State v. Whitfield, 837 S.W.2d 503 (Mo.banc 1992);

State v. Beck, 745 S.W.2d 205 (Mo.App.E.D. 1987);

State v. Allen, 251 S.W.2d 659, 363 Mo. 467 (Mo. 1952).

Point Eight

The trial court erred in overruling Lewis' motion for relief from his unlawful extradition from Oklahoma to Missouri, refusing to order that Lewis be returned to Oklahoma, and proceeding to trial over his objections. This violated Lewis' rights to due process of law, access to the courts, due process of law, equal protection of the law, fundamental fairness, freedom from cruel and unusual punishment, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, and XIV, Mo.Const., Art. I, §§2, 10, 14, 18(a), and 21. It also violated Chapter 22, §§1141.1-1141.30, Oklahoma Statutes. Lewis was prejudiced in that the state was allowed to benefit from its own illegal action of wrongful extradition; had the state been required to follow the law, Lewis might never have been brought to Missouri, convicted, and sentenced to death.

State v. Nenninger, 188 S.W.2d 56 (Mo.1945)

U.S.Const., Amend's V, VI, VIII, and XIV

Chapter 22, §§1141.1-1141.30, Oklahoma Statutes

§548.101, RSMo. (2000);

§548.111, RSMo. (2000).

ARGUMENT

As to Point One: The trial court erred in sustaining the state's objection and refusing to let defense counsel ask potential jurors during voir dire if they had personally made a statement -- oral or written -- "about the death penalty." This violated Lewis's rights to fair jury trial, due process, freedom from cruel and unusual punishment, and reliable sentencing. U.S.Const.,Amend's V,VI,VIII, and XIV, Mo.Const.,Art.I, §§10,18(a) and 21; it violated §494.470.1 & .2, RSMo.2000 (persons who have "formed or expressed an opinion concerning the matter or any material fact in controversy that may influence" their judgment and "whose opinions or beliefs preclude them from following the law" shall not be sworn as jurors and are "ineligible to serve...") The ruling prejudiced Lewis by preventing him from eliciting facts -- statements prospective jurors had made about the death penalty -- relevant to: determining jurors' true and fixed beliefs and opinions about the death penalty, gauging whether jurors were truly able to follow the law and were qualified to serve in a death penalty case, and intelligently using peremptory challenges. That the court allowed questioning about "articles" jurors had written or "speeches" jurors had given about the death penalty shows that a question about what jurors have said in less formal settings concerning the death penalty is an appropriate, relevant question in a capital trial and authorized by §§494.470.1 & .2. Because few people make speeches or write articles about the death penalty, counsel's ability to obtain information was unreasonably limited. Contrary to the prosecutor's objection, the question was "material" in that it 1) sought facts

"relevant" to determining whether any juror had "formed or expressed an opinion concerning the matter or any material fact in controversy in [the] case...," and 2) provided information the prosecutor, himself, relied on in moving to strike jurors Zacher and Casady for cause. If the state's question -- whether jurors had "preferences," "predispositions," or "reservations" about the penalties -- was "relevant," then seeking facts showing preferences, predispositions or reservations is relevant.

During the state's voir dire of the first "death qualification" panel, the prosecutor asked each juror if she or he had a "predisposition" or "preference" or "any reservation" about either penalty (T384- 401).

When it was defendant's turn, counsel attempted to ask the jurors about statements they, themselves, had made about the death penalty:

> [Defense Counsel]: Can you recall -- and I agree that this is not a thing that people talk about every day. I'm asking if you recall personally ever having made a statement from words from your own mouth or maybe written a letter to the editor or anything about the death penalty? I'm talking about do you recall ever making a statement about the death penalty from your own mouth? If you do --
>
> Venireman Thomas: No.
>
> [Prosecutor]: Objection. Irrelevant and immaterial.
>
> [Defense Counsel]: May we approach?

(T411).

At the bench, defense counsel explained, "asking jurors if they have ever personally

specifically made statements, either orally or in writing, from their own mouth, about the death penalty, is an important question in this process" relating to counsel's ability "to make intelligent requests for strikes for cause and intelligent peremptories" (T411). Counsel's question sought "historical information that goes to fixed opinions or belief[s] of the jurors" (T411-12). Counsel explained that 'if a juror, in response to this question, told me that they had a strong relationship, advocated for the death penalty or made a statement last week saying, "Anyone who kills someone should get the death penalty," that would give me reason to be suspect of a juror's representation that they can consider both punishments...' (T412). Counsel distinguished his question from those disapproved in ***State v. Kreutzer***, 928 S.W.2d 854 (Mo.banc1996) because he was 1) not seeking a commitment from the jurors, 2) not asking open-ended questions about feelings, thoughts or beliefs or comparing one venireperson's beliefs to another's, 3) not misstating the law, and 4) not asking confusing, argumentative, or irrelevant questions (T412-13).

The state responded:

> I think that the issue, as always, is whether the venireperson is capable of following the instructions of the Court and keeping in mind whether they can seriously consider a vote for both sentencing alternatives. Whether they've made any statement in the past, pro, con, or indifferent, does not aid that inquiry.

(T413). The prosecutor did not explain how his own questions to the venire -- if they had any "preference" or "predisposition" for one penalty or the other -- fit into his strait jacket of appropriate voir dire questions.

Doubting anyone would remember "what they've said about anything over the years

just in informal talk," the court opined there was "a difference between somebody having written an article about the death penalty or having made a public speech about the death penalty" and "just coffee counter talk" (T413). The court ruled counsel could ask the jurors if they had made any public speeches or done any "formal" writings about the death penalty (T414). Defense counsel reiterated his desire to "go farther than the Court is saying" but the Court overruled that request and limited the defense to asking only about a "formal type of statement and writing" (T414).

The defense preserved this ruling for appellate review by including it in the motion for new trial (LF 273-76).

The very purpose of voir dire -- "to discover bias or prejudice in order to select a fair and impartial jury" -- explains why the court's compromise-ruling was insufficient and its refusal to let the defense ask prospective jurors about all statements -- "formal" or "personal" and "informal" -- that they had made about the death penalty an abuse of discretion, a violation of defendant's Sixth and Fourteenth Amendment rights, and reversible error. ***State v. Clark***, 981 S.W.2d 143, 146 (Mo.banc1998) ("The purpose of voir dire is to discover bias or prejudice in order to select a fair and impartial jury") *citing* ***State v. Leisure***, 749 S.W.2d 366, 373 (Mo.banc1988); ***State v. Smith***, 649 S.W.2d 417, 428 (Mo.banc1983) ("[D]efendant should be permitted to develop not only facts which might manifest bias and form the basis of a challenge for cause, but also such facts as might be useful to him in detecting the possibility of bias and intelligently utilizing his peremptory challenges"); ***State v. Womack***, 967 S.W.2d 300, 302 (Mo.App.W.D.1998) *(*"The purpose of voir dire is to explore and develop facts which would uncover possible

bias and/or prejudices of the jurors so that counsel for each party can knowledgeably use their challenges").

"The primary purpose of death qualification is to ascertain whether prospective jurors have such strong views about the death penalty that they cannot be impartial in sentencing." ***Clark***, 981 S.W.2d at 148 *citing* ***Morgan v. Illinois***, 504 U.S. 719, 728-29 (1992). "Any veniremember who cannot be impartial is unfit to serve, whether the partiality is due to an aversion to the death penalty, an excessive zeal for death, or any other improper predisposition." ***Id***. '"Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." ***Clark***, 981 S.W.2d at 146 *citing* ***Morgan***, 504 U.S. at 729-30. 'To this end, "a liberal latitude is allowed in the examination of jurors."' ***Id***. *citing* ***State v. Granberry***, 484 S.W.2d 295, 299 (Mo.banc1972). Review is for abuse of discretion. ***Id***. at 146-47 *citing* ***State v. Betts***, 646 S.W.2d 94, 98 (Mo.banc1983). "In addition, as to guilt and innocence, the defense must have the opportunity to identify veniremembers whose views on the death sentence will interfere with their verdict in the guilt phase." ***Id***. at 148 *citing* ***Lockhart v. McCree***, 476 U.S. 162,170 n. 7 (1986); ***Witherspoon v. Illinois***, 391 U.S. 510, 522-523 n.21 (1968).

A court may rely on a "juror's testimony concerning his or her ability to act impartially," ***Ray v. Gream***, 860 S.W.2d 325, 334 (Mo.banc1993), but a juror may not be the "'judge of her own qualifications."' ***Doyle v. Kennedy Heating and Service, Inc.***, 33 S.W.3d 199, 201 (Mo.App.E.D.2000) *citing* ***Seaton v. Toma***, 988 S.W.2d 560, 562

(Mo.App.S.D.1999).

Sections 494.470.1 & .2 not only underscore the importance of questions designed to elicit facts -- as opposed to the jurors' self-evaluation of themselves and their abilities -- so as to uncover bias, prejudice or "predisposition," these sections also secure the right to ask such questions:

> 1. No ... person who has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may influence the judgment of such person ... shall be sworn as a juror in the same cause.
>
> 2. Persons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors on that case.

Defense counsel's proposed inquiry -- seeking statements jurors themselves had made, personally, about the death penalty -- would have been an effective means of discovering facts and information pertinent to whether any potential jurors were biased or prejudiced or had "expressed an opinion" regarding the death penalty and therefore were not qualified to serve in a death case. ***Id***. Simple and straightforward, the question called for a factual answer: statements the jurors themselves had made about the death penalty.

That the trial court allowed defense counsel to ask about "formal writings" and speeches can only mean the court agreed that what the jurors had themselves said in the past about the death penalty was a valid subject for death qualification voir dire. But restricting the inquiry to only formal writings and speeches -- because the court thought the jurors would not "remember[] what they've said about anything over the years just in informal talk" -- served only to preclude disclosure of relevant and important information

about the jurors.

There was no danger or possible prejudice from asking about *all* statements. If the court were correct, at worst the jurors would not remember making statements and no additional information would be forthcoming.

Limiting the inquiry to formal speeches and writings did not advance selection of a fair and impartial jury. Few people make speeches or write papers about the death penalty. In the present case, only five (5) jurors responded to that question and all involved academic settings. And, as the voir dire in this case demonstrated, "formal" writings and speeches do not necessarily reflect the true beliefs, biases, and opinions of the jurors.[5]

Three jurors wrote papers or participated in class discussions while in college. In a Current Affairs class in college, "[t]wenty years ago," juror Zacher and the other students "debated ... took positions and wrote papers" about the death penalty (T414-15). Mr. Zacher did not indicate what position he took in his paper or whether it reflected his own opinion. Juror Casady wrote two papers about the death penalty twenty years ago

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[5] In other contexts, the law recognizes "formal" statements are not necessarily more trustworthy than statements made informally to close friends. *See, e.g.*, ***Chambers v. Mississippi***, 410 U.S. 284, 300 (1973) (fact that hearsay statement had been made to a close friend was indicative of its reliability); ***State v. Davidson***, 982 S.W.2d 238, 242 (Mo.banc1998) (one indicator of reliability of hearsay statement is that it was "spontaneously made to a close acquaintance").

(T538). One was "historical and research" (T539). The other presented her opinion on the death penalty which she did not then support (T539). In 2000, juror Bledsoe participated in a discussion about the death penalty in criminal justice class (T539-40). The discussion was not a debate "for" or "against" the death penalty; Mr. Bledsoe did not express support or opposition to the death penalty in the class (T540-41). Jurors Harris and Mackey, teachers, indicated the death penalty was a topic in their classrooms. Neither expressed their personal views about the death penalty in class (T415-16).

Inasmuch as it was the prosecution, not the defense, that ended up making use of the little bit of information obtained through the restricted questioning approved by the court, it cannot be disputed that the information sought by counsel would have benefited both parties in their quest for a fair and impartial jury. Arguing that Mr. Zacher should be struck for cause, the prosecutor gave as one reason Mr. Zacher's "paper on death penalty" (T429). Likewise, in attempting to strike juror Casady for cause, the prosecutor referred to Ms. Casady's "paper in opposition to the death penalty" (T545).

The responses of some jurors indicated that they had given little or no thought to the death penalty prior to appearing for jury duty, *e.g.*, Acton (T394), Cassity (T453), Hess (T500-01), and Martin (T516), suggesting that they were unlikely to have made statements about the death penalty prior to trial. But the responses of other jurors indicated that they had at least thought about the death penalty in the past, *e.g.*, Anthony (T388), King (T389), Zacher (T397, 415), Harris (T415), Mackey (T415-16), Anderson (T444-45), Lock (T504), and Casady (T508). As to those jurors who previously had considered and thought about the death penalty, it was likely -- contrary to the

prosecutor's refrain[6] that "we don't sit around and talk about this sort of thing with the family over coffee on Sunday afternoons" -- that they had participated in discussions about the death penalty and would recollect what they themselves had said.

With regard to numerous jurors[7] who denied a preference, predisposition, or reservation concerning punishment, defense counsel's disallowed question was an appropriate and effective means of checking the jurors' self-assessments and eliciting facts useful for both parties in "form[ing] the basis of a challenge for cause" and "intelligently utilizing peremptory challenges." ***Smith***, *supra*, 649 S.W.2d at 428. Other jurors' responses, although denying a predisposition, preference or leaning in favor of the death penalty, suggested they favored the death penalty. The disallowed question was well designed to gather facts relevant to determining whether those (and other) jurors could serve impartially in a death penalty case and the intelligent use of peremptory strikes. These included juror Southerland who commented that keeping "a man in jail, in prison forever ... costs taxpayers tons of money," (T442-43), and juror Alexander who, when asked if he could vote for life and death said "yes" to death and "I think so" to life (T452).

Appellant has not found any cases presenting the same circumstances as the instant case: where the trial court refused to allow counsel to voir dire prospective jurors about statements they had made previously concerning "the matter or any material fact in

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[6] (T377,433,517)

[7] *E.g.*,T384-87,390-92,398-400,441,455-56,459-65,467,501,506-11,521.

controversy" in the case. But several cases indicate that a juror's prior statements are an appropriate and important subject of inquiry during voir dire. These include ***Knese v. State***, No. SC83822 (Mo.banc August 27,2002) 2002WL1969388*2-3 (failure to read jury questionnaires in which prospective jurors expressed opinions "on crime and the death penalty" and failing to voir dire jurors about opinions expressed in questionnaires was ineffective assistance of counsel; "[a]t a minimum, counsel should have read the questionnaires, and voir dired to determine whether they could serve as jurors"); ***State v. McMillin***, 783 S.W.2d 82,92 (Mo.banc1990) (prosecutor could ask venire 'whether they believed the death penalty was a necessary law' because '[i]n a capital murder case, inquiry into the veniremembers' views regarding the death penalty is of "critical importance to the state, the defendant and the court'"); ***Petteway v. State***, 785 S.W.2d 861, 865 (Tex.App.1988) (evidence showing that prior to trial juror 'had stated that he was "going to get Henry Petteway,"' established that juror had "expressed bias or prejudice against" the defendant and should have been dismissed for cause; ***Blann v. State***, 695 S.W.2d 382,385-86 (Ark.App.1985) (in connection with motion for new trial, court heard testimony from various witnesses supporting and refuting defendant's claim that a juror, some seven months before trial, had made statements revealing his bias against the defendants, e.g., that juror had had "trouble" with the defendants' brother and that the defendants should be in jail).

The prosecutor's own questions and comments during voir dire confirm that defense counsel's disallowed question was relevant:

When a potential juror indicated that she or he could not vote for the death penalty,

the prosecutor questioned that juror further as to whether it was a "belief" the juror had "held for some time," *e.g.*, (T388) or if the death penalty was something the juror had "thought about" or "reached a decision on" prior to today *e.g.*, (T394,397,504). If it was relevant for the prosecutor to ask whether the jurors had *thought about* the death penalty "before … today," then it was equally relevant for defense counsel to ask whether the jurors had made *statements* about the death penalty. Either both are relevant or neither is relevant.

The prosecutor asked the jurors if any of them were members of "any group that advocates against the death penalty, contributes to any such group or advocates against imprisonment as a punishment" (T405,522). If statements made by an organization to which a juror belonged are relevant, how can a juror's own statements regarding the death penalty be "irrelevant?"

The prosecutor questioned virtually every juror on every panel as to whether or not he or she had a "predisposition," "preference," or any "reservations" with regard to the sentencing options of life without probation or parole and death (*e.g.*, T384-401,441-68,497-521). If a juror's opinion regarding his or her "predisposition" or "preference" is relevant, how can facts about predisposition or preference -- a juror's own statement about the death penalty -- not be relevant?

The prosecutor asked a number of jurors whether they could sit in the courtroom while a death verdict was announced.[8] If a question requiring the jurors to speculate on their

[8] T402,454,457-58,500,518.

own future reactions is a relevant question, then asking jurors if they had made statements about the death penalty -- a question involving real, non-speculative, existing facts -- must also be relevant.

During his death qualification voir dire, the prosecutor commented,

> Look, folks, we don't sit around and talk about this sort of thing with the family over coffee Sunday afternoons. Some of you may be thinking about this for the first time in your lives...

(T377,433,517). The prosecutor could not know whether any of the jurors had previously "[sat] around … and talk[ed] about" the death penalty. But his comments implicitly acknowledge that if jurors ***had*** discussed the death penalty previously, what the jurors had said during those discussions would be relevant.

It is very possible that a juror might claim no predisposition either way during jury selection, and yet have said at some earlier time something like, "Everyone who intentionally kills someone else should get the death penalty." Despite having previously voiced this opinion, it is also very possible that such a juror could claim at the jury selection that he could consider both punishments. In a case where the state is seeking the death penalty, the appropriateness of the death penalty is always at issue, and the juror's prior statement is "an opinion concerning the matter or any material fact in controversy... [that may] preclude them from following the law as declared by the court in its instructions." §§494.470.1 & .2. If defense counsel were allowed to ascertain that the previous statement had been made, he would be able to use that information to intelligently make strikes for cause or peremptory strikes.

Reasonable defense counsel would determine whether or not to believe the juror's claimed change of heart based on the circumstances of the earlier statement(s) including such factors whether it was recent or remote, the strength of the viewpoints expressed, the content of the earlier statement, and how it related to other voir dire statements. In fact, it might be unreasonable and ineffective for a defense attorney to fail to challenge for cause or strike peremptorily a juror who previously had made a pro-death statement but indicated during jury selection that he could be fair. ***Knese v. State***, *supra*.

Can the value of such information really reasonably be disputed? The real question is whether jury selection will be allowed to be a meaningful process where defense counsel can ask questions calling for specific answers about historic, relevant events.

Allowing the prosecutor to ask about jurors' opinions or beliefs ("preferences," "predispositions," "reservations"), but refusing to allow the defense to ask jurors about previous statements regarding the death penalty was arbitrary, unreasonable, inconsistent and an abuse of discretion in violation of the 6th and14th Amendments.

> It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' ... At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'

Murphy v. Florida, 421 U.S. 794, 800 (1975); *see also* ***Morford v. United States***, 339 U.S. 258 (1950) (trial court's refusal to allow counsel to voir dire prospective jurors about the possible influence of the Executive "Loyalty Order" on their ability to be fair and

impartial was reversible error).

For the foregoing reasons, the trial court's judgment must be reversed and the cause remanded for a new penalty phase trial.

<u>As to Point Two</u>: The trial court erred in overruling defense objections to the verdict directors -- Instructions 6 and 10 -- attributing the physical conduct (the "conduct element") of shooting the Brewers to "defendant or Eric Elliott." This violated Lewis's rights to due process of law, fair trial by a properly instructed jury, freedom from cruel and unusual punishment, and reliable sentencing. U.S.Const.,Amend's V, VI, VIII, XIV; Mo.Const., Art. 1, §§10, 18(a), and 21. It also violated Note 5, Notes on Use, MAI-CR3d 304.04, and Rule 28.02(f). All the evidence was that codefendant Eric alone shot the Brewers and only Eric committed the conduct elements of the offense. There was no evidence that defendant Lewis Gilbert committed any conduct elements of the offense. Note 5, Notes on Use to MAI-CR3d 304.04, provides that when "the conduct elements of the offense were committed entirely by someone other than the defendant... (1) all of the elements of the offense, including the culpable mental state, should be ascribed to the other person or persons and not to the defendant..." Lewis was prejudiced because these instructions told the jury there was evidence that Lewis shot the Brewers and the court approved the jury finding Lewis shot the Brewers. Without evidence that Lewis shot the Brewers, the instruction improperly authorized the jury to ignore the evidence, find Lewis shot the Brewers, reject the felony murder defense, and reach a verdict based on so-called facts improperly inferred from a disbelief of Lewis' testimony and statements, and their own speculative ideas.

Instructions 6 and 10, patterned after MAI-CR3d-304.04, modified by MAI-CR3d

313.02, provided:[9]

> As to Count I [II], if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about August 30, 1994, in the county of Callaway, State of Missouri, the defendant or Eric Elliott caused the death of Flossie [William] Brewer by shooting her [him], and
>
> Second, that the defendant or Eric Elliott knew or was aware that his conduct was practically certain to cause the death of Flossie [William] Brewer, and
>
> Third, that the defendant or Eric Elliott did so after deliberation, which means cool reflection on the matter for any length of time no matter how brief
>
> then you are instructed that the offense of murder in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:
>
> Fourth, that with the purpose of promoting or furthering the death of Flossie [William] Brewer, the defendant aided or encouraged Eric Elliott in causing the death of Flossie [William] Brewer and did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief
>
> then you will find the defendant guilty under Count I of murder in the first degree.
>
> However, unless you find and believe from the evidence beyond a reasonable

[9] Except for the Count number (I or II) and the name of the victim (Flossie or William Brewer), the verdict directors for Counts I and II were identical.

doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(LF201,205).

Officer Becker interviewed Lewis after his arrest and testified about that interview at trial:

Lewis and Eric Elliott drove from Ohio to Missouri, parked in a field, slept, and upon waking, realized the car was stuck (T863). They decided to go to a nearby house, explain that the vehicle was stuck, and ask to use a phone to call a "wrecker" (T863).

Lewis and Eric talked with a couple at the house, the Brewers, for about 30 minutes (T864). Then "one of them" -- Eric or Lewis -- pulled out the .22 (T864). "[T]ogether they tied this lady's hands behind her back" and led her and the man into the cellar (T864). Once in the cellar, Eric shot the lady three times and she fell onto a wood pile (T864). Eric then shot the man three times (T864). ***Lewis consistently and clearly told Becker that he had not killed the Brewers*** (T868-69; emphasis added).

There was no evidence that Eric and Lewis ever discussed killing the Brewers (T870). There was no evidence that Eric and Lewis planned to kill the Brewers before going into their house, and there was no evidence that once inside the house they discussed killing the Brewers (T870).

Lewis testified at trial:

When he went to the Brewers' house with Eric, Lewis intended "to rob them and take their money and their car" (T908). Once inside, in accordance with their plan to rob them, Eric and Lewis asked the Brewers for their car keys and money (T908). The plan

was "to tie them up and put them someplace secure" so there would be time to get away (T908).

Lewis tied Mrs. Brewer's hands behind her back with a telephone cord (T910, 917).

He took her downstairs and put her in a room "on the side" (T911). Leaving her downstairs, Lewis went upstairs into the kitchen where he met Eric who indicated that he was going downstairs to tie up the Brewers, "tie their feet together so they couldn't move around" (T912). Eric and Lewis would then leave (T912). Lewis made a sandwich; while he and the Brewers' dog ate the sandwich in the kitchen, he heard three quick shots followed by a pause, then two more shots, then another pause and a final shot (T 912). Eric ran through saying, "Let's go. Let's go" (T912). Eric told Lewis he shot the Brewers because "they can identify us" (T913).

At the instruction conference, defense counsel objected to the form of the verdict directors -- Instructions 6 and 10:

> See, my objection is I think that the notes on use to 304.04, notes on use [Note] 5A, indicates that when the evidence is that the conduct elements are committed entirely by another person or persons, that all of the elements should be ascribed to the other person or persons and not to the defendant. I think it says that in 5A of the notes on use.
>
> And so for that reason, I'm objecting to those instructions ascribing the acts. All of them, I believe that all the evidence was the physical acts were committed by Eric Elliott. And I don't think there's an exception in the law when all the evidence perhaps comes from the statement of the defendant.

(T964-65).

The trial court overruled defense counsel's objections without reference to the Instructions or the Notes on Use:

> Well, that objection will be overruled. And the Court's thinking on the matter is that, ***even if we were to consider that there was nothing about Eric Elliot involved in this case***, if we had evidence in this case that Mr. and Mrs. Brewer were dead, that the defendant had been seen in an automobile in Ohio a short time before that ended up in a field within a quarter of a mile of the Brewers' house, that the Brewers had been found dead, that afterwards the defendants -- the Brewers' automobile was found in Oklahoma with the defendant having been placed in that automobile in Oklahoma, and that he was later found in new Mexico, once again within arm's reach of the weapon that fired the shot that killed Mr. and Mrs. Brewer, that would be sufficient on itself to convict the defendant of first-degree murder.
>
> And so that's the reason. And the only evidence that Eric Elliott fired the bullet does come from the defendant himself, either by his confession or by his testimony.

(T965-66; emphasis added). The defense preserved this point for review by including it in the motion for new trial (LF315-16).

The trial court's analysis missed the mark. It addressed the ***sufficiency*** of the evidence to convict Lewis Gilbert -- ***not*** whether the instructions covered the evidence adduced at the trial. A determination that evidence is sufficient fails to address, and does not resolve, whether instructions are correct. *See, e.g.,* ***State v. Puig***, 37 S.W.3d 373, 375-78 (Mo.App.S.D.2001) (evidence was sufficient to show that defendant consciously

aided and encouraged sale of marijuana, but court reversed because verdict director, patterned after MAI-CR3d 304.04, "alleged that [Defendant] 'acted together with or aided' [Mr.] Anderson in selling marijuana though there was no evidence that [Defendant] acted together with Mr. Anderson to commit any 'conduct elements' of the offense...").

Contrary to the court's hypothetical -- "even if we were to consider that there was nothing about Eric Elliott involved in this case" -- Elliott ***was*** involved in the case and there was no ***evidence*** that anyone ***other*** than Elliott shot the Brewers. In the court's hypothetical, no one but Lewis was implicated in the offenses and the Note cited by defense counsel would be inapplicable.

But this hypothetical spawned a set of facts different than those presented at the trial. Whether or not useful in determining whether the evidence was ***sufficient*** to convict Lewis of first degree murder, the hypothetical was erroneously and dangerously misleading as far as determining the ***instructions***. Instructing the jury that "defendant or Eric Elliott" committed the shooting of the Brewers invited the jury to speculate -- to find facts contrary to the evidence presented based on nothing more than a disbelief of Lewis' statements and testimony -- and, relying on such illusory, nonexistent facts, to reach a verdict diverging beyond the evidence presented. The error in the instructions prejudiced Lewis.

"The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes on Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to

Rule 28.03." Rule 28.02(f); ***State v. Caldwell***, 956 S.W.2d 265, 267 (Mo.banc1997).

> "The basic principle applicable to the submission of instructions is that they should not be given if there is no evidence to support them. Instructions must be supported by substantial evidence and reasonable inferences to be drawn therefrom. Instructions which are at variance with the charge or which are broader in scope than the evidence are improper unless it is shown that an accused is not prejudiced thereby."

State v. Sparks, 701 S.W.2d 731, 733-34 (Mo.App.E.D.1985) (Where defendant & others were charged with disposing of stolen property -- sows -- and the evidence showed that defendant "aided" in committing the offense by lending his truck to the others, and there was no evidence that the defendant actually "disposed" of the sows, it was reversible error to instruct the jury that "the defendant, or others" disposed of the sows because "the jury was allowed to speculate as to things defendant might have done which were not supported by evidence") citing ***State v. Daugherty***, 631 S.W.2d 637, 639-40 (Mo.1982) (citations omitted). Where "there is no evidence to support an instruction" naming the defendant as the person who committed conduct comprising an element of the offense, the instruction allows the jury "to speculate as to things defendant might have done which were not supported by evidence." ***Id***. *citing* ***State v. Dickerson***, 649 S.W.2d 570, 572 (Mo.App.S.D.1983) (reversible error to submit verdict director not conforming to evidence adduced at trial in that it posited that jury must find that defendant, "personally and actually committed all of the elements of robbery" where defendant's companions entered victim's house and,

using a knife, robbed victim while defendant remained outside on victim's front porch as a "lookout").

In ***State v. Scott***, 689 S.W.2d 758 (Mo.App.E.D.1985), the defendant, knowing that his friend, Glasby, planned to rob the victim, accompanied Glasby to the victim's house. ***Id***. at 759. Glasby asked the victim for money; she refused but gave Glasby and defendant something to eat. ***Id***. 'While they ate, Glasby said "I'm gonna shoot the bitch now," went to the window, and shot her in the head at close range when she approached the window.' ***Id***. Glasby went into the house and took money and various items belonging to the victim; he gave some of the property to defendant. ***Id***.

On appeal, defendant contended that, because the evidence showed that Glasby "shot, killed and robbed the victim," it was "prejudicial" error to hypothesize in the verdict director that "'the defendant or Keith Glasby killed the victim. ***Id***. at 760. Reversing, the Court cited the Notes on Use which provided that when "the evidence shows the conduct of the offense was committed entirely by someone other than the defendant and the sole basis for defendant's liability is his aiding the other person ... then all the elements of the offense should be ascribed to the other person ... and not to the defendant." ***Id***.

In the present case, as in ***Scott*** and ***Sparks***, the evidence was that Lewis did no more than aid and assist Eric. Lewis himself did not commit any elements of the charged offenses of murder.

The present case is distinguishable from cases such as ***State v. Shurn***, 866 S.W.2d 447 (Mo.banc1993) in which the evidence did not clearly establish who shot the victim. In ***Shurn***, the defendant argued that the verdict director should have ascribed "all the

elements of the offense" to his codefendant, Weaver, because "the conduct of the offense was committed *entirely* by Weaver. ***Id***. at 462. This Court disagreed:

> Contrary to Shurn's claim, the evidence is not clear that Weaver alone murdered Taylor. Both Shurn and Weaver chased Taylor behind the apartment complex; one witness testified that she saw both Shurn and Weaver running with their hands up as if both were carrying guns; persons living in the complex heard gunshots; Shurn and Weaver returned to the car; Weaver then went behind the complex again; witnesses heard more shots; Weaver returned to the car, which left the complex.

Id.

In the present case, both sides agreed that Lewis was involved in the offenses; "the only real issue" was the "degree" of guilt (e.g., T976, 982-83). Therefore, the extent of Lewis' participation was critical.

Despite the lack of actual evidence, the verdict directors instructed the jury that they could find as fact, and use as fact to convict Lewis of first degree murder, that Lewis was the person who physically committed the offenses (LF201, 203-04, 205, 207-08). This error in the verdict directors -- positing as fact matters not supported by the evidence -- was prejudicial because it relied on nonexistent facts -- that Lewis physically committed the killings -- thus encouraging the jury to rely on those to find Lewis guilty of first degree murder.

It invited the jury to reject the defense -- that Lewis was guilty only of second degree felony murder -- by relying on the wording of the instruction and finding as fact, despite the lack of evidence, that Lewis physically committed the killings and therefore was

guilty of first degree murder. The verdict directors improperly incorporated speculation and presumption -- that Lewis physically committed the killings -- as fact.

The prejudice was compounded by the prosecutor's inaccurate argument misstating the evidence. Opening guilt phase argument, the prosecutor told the jury that Lewis and Eric "killed the Brewers" (T980). But he could not back up that prejudicial statement with any evidence: because there was no such evidence. There was no evidence at trial that "the conduct elements of the offense[s] were committed by" Lewis. Note 5(a), Notes on Use MAI-CR3rd 304.04. There was no evidence that Lewis actually, physically, killed the Brewers. The most the prosecutor could say was, "when the phone book was not available, it was at that time they decided to kill the man and the woman" (T981). This says nothing about who committed the conduct -- who shot the Brewers.

The defense argument agreed that the issue was Lewis' degree of guilt, but said that he was guilty of second degree felony murder:

> Lewis personally has to have had the purpose that the Brewers die, and he has to have coolly reflected on that killing ahead of time or it is not murder in the first degree...
>
> What this is, what's been proved is two second-degree murders as to Lewis Gilbert. We're not talking about Eric Elliott here today and what offense he committed. But as to Lewis Gilbert, what we're talking about is what is two second-degree murders...
>
> And they were not equally guilty... Eric Elliott shot the Brewers, and there is no evidence otherwise. Unless you -- ***There is no evidence that's been come into***

this courtroom otherwise, unless you want to rely on sort of speculation or guesswork.

All of the evidence is that Eric Elliott shot the Brewers.

(T982-84; emphasis added).

The state respond by asserting that lack of evidence -- *what the jury had not been told* -- and Lewis' failure to deny killing the Brewers, was proof of guilt. Not only was this incorrect as a matter of law, it most prejudicially and blatantly misstated the evidence presented through Becker's testimony:

It is not the case that all the evidence is that Eric Elliott shot the Brewers. We don't know that. You know, the defendant had an opportunity with Daniel Becker. I don't know his level of education. I don't know if he's some stupid kid.

He didn't say, "I didn't kill them." He could have.

He didn't say, "I didn't do it." There's four words that would have been completely different from what he said to Daniel Becker.

You remember what he said to Daniel Becker?

"Either you killed these people out of self-defense or some justifiable reason or you're just a cold-blooded killer, ***you and him***. Which is it?"

"One or the other. One of them."

(T997-98; emphasis added).

Lewis most definitely denied killing the Brewers, and he told Becker that Eric killed them:

Q. [Defense counsel] Now, regarding the deaths of the Brewers, he clearly said to

you, and it never changed, that he had not killed the Brewers; is that right?

A. [Becker] Correct.

Q. He told you that Eric Elliott had done that?

A. Yes, he did.

Q. He told you Eric Elliott had killed -- I guess he wasn't using the name, but he told you Eric Elliott had killed the woman and Eric Elliott had killed the man?

A. Yes.

Q. And he was consistent about that?

A. Yes, he was.

Q. I mean, you've interviewed suspects before who said one thing and then told you something different, but he was consistent about that?

A. Yes, he was.

(T868-69).

Even assuming, solely for purposes of argument, that the exchange between Becker and Lewis quoted by the prosecutor -- "Either you killed these people out of self-defense or some justifiable reason or you're just a cold-blooded killer, ***you and him***" pertains to the offenses charged in Missouri, and even assuming, again solely for argument, it shows Lewis deliberated ("cold-blooded") on killing the Brewers, it is still not evidence that "the conduct elements of the offense" were committed by Lewis. Being a "cold-blooded" killer is possible for a person who does not commit the conduct elements -- the physical killing. ***State v. Rousan***, 961 S.W.2d 831,841-42 (Mo.banc1998); ***State v. Petty***, 967 S.W.2d 127, 133-35 (Mo.App.E.D.1998).

Lack of evidence as to a particular fact, and disbelief of evidence concerning that fact, are not proof of the contrary:

> 'If disbelief operates as proof, then the jury may always find on any issue unfavorably to a defendant who offers evidence favorable to himself, despite lack of other evidence on the issue. This is not the law. See ***Boatmen's Savings Bank v. Overall***, 16 Mo.App. 510, 515-16, where the point is clearly made thus:
>
> > "* * * *We find no evidence in the record to support this* ***instruction****, unless we can assume as a legal proposition that a jury may, when a fact is asserted by a discredited witness, not only disbelieve him, but consider his assertion of one fact as affirmative testimony of another fact diametrically the reverse.* This we must decline to do.'

State v. Dodson, 496 S.W.2d 272, 274-75 (Mo.App.K.C.D.1973) *quoting* ***State v. Taylor***, 422 S.W.2d 633, 638 (Mo.1968) (emphasis added).

> The effect of disbelief by the jury of the defendant's testimony is, of course, persuasive in the jury's arriving at their verdict, but it is not probative and does not constitute substantive proof on a material issue not there...

Id. at 638.

The prosecutor's argument in the present case recalls the prosecutor's argument in ***State v. O'Brien***, 857 S.W.2d 212 (Mo.banc1993) in which that prosecutor also misstated the law:

> We don't know for sure what the defendant did, but we do know he was

> involved in this crime. We do know that don't we, because he sits up there and tells you some cocking [sic] bull story about how it happened, and we know it's not the truth....
>
> Simply because a defendant's self-serving statements may not be credible does not give the jury license to speculate on what happened when there is nothing else to go on. Certainly, the jury was not required to believe O'Brien, but neither was it permitted to invent a version of facts--unsupported by any evidence--that fits the crimes charged...

Id. 857 S.W.2d at 219-20.

For the foregoing reasons, attributing the conduct elements of the offenses to Lewis in the instructions, authorizing the jury to find Lewis killed the Brewers, was prejudicial. The cause must be reversed and remanded for a new trial.

<u>As to Point Three</u>: The trial court erred in overruling Lewis' motion to quash the information and erred and exceeded its authority and jurisdiction in imposing death sentences on Counts I and II. This violated Lewis' rights to due process of law, to notice of, and to be tried and sentenced only for, the offenses charged, and to freedom from cruel and unusual punishment, U.S.Const. Amend's XIV, VI, and VIII; Mo.Const., Art I, §§10, 17, 18(a) and 21; Section 565.030.4(1). Missouri's statutory scheme authorizes a sentence of death only upon a finding of at least one of the seventeen statutory aggravating circumstances comprising alternate elements of the offense of "aggravated first degree murder" and facts of which the prosecution must prove at least one to increase the punishment for first degree murder from life imprisonment without probation or parole to death. The information filed by the state failed to plead any aggravating circumstances as to the two charged offenses of first degree murder thus did not include any facts authorizing enhancement of the sentences to death. The offenses actually charged against Lewis and of which he had notice were unaggravated first degree murders for which the only authorized sentence is life imprisonment without probation or parole. The trial court lacked jurisdiction to sentence Lewis to death, and the death sentences imposed were not authorized. Lewis' sentences of death must be vacated, and he must be resentenced to life imprisonment without probation or parole.

In ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), the United States Supreme Court reiterated that in ***Jones v. United States***, 526 U.S. 227 (1999), in "'construing a federal statute" ' the Court had 'noted that "under the Due Process Clause of the Fifth

Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." ' 530 U.S. at 476 citing ***Jones***, 526 U.S. at 243, n. 6. The Court then held that "[t]he Fourteenth Amendment commands the same answer in this case involving a state statute." ***Id***.

In the present case, the state failed to charge any aggravating circumstances in the information (LF42-44). The sentences of death imposed upon Lewis thus violated his rights to due process of law, notice of the charges against him and jury trial. U.S.Const., Amend's XIV and VI; Mo.Const., Art 1, §§10, 17, 18(a), and 21. The United States Supreme Court has never ruled on the precise point raised by appellant, but the Court has repeatedly acknowledged the relationship between facts that must be found by a jury beyond a reasonable doubt, facts that must be pled in the charging document, and the lack of "notice" when such facts are not charged in the indictment or information:

> "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170]." Archbold, Pleading and Evidence in Criminal Cases, at 51. If, then, "upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the

circumstances specified in the statute, the defendant shall be convicted of the common-law felony only." *Id.*, at 188.

Apprendi, 530 U.S. at 480-81.

> [F]act[s] that increase[d] the penalty for a crime beyond the prescribed statutory maximum ... were what the Framers had in mind when they spoke of "crimes" and "criminal prosecutions" in the Fifth and Sixth Amendments: A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment.'

Harris v. United States, 122 S.Ct. 2406, 2417 (2002).

Facts extending the sentence beyond the statutory maximum had traditionally been charged in the indictment and submitted to the jury, ***Apprendi*** said, because the function of the indictment and jury had been to authorize the State to impose punishment:

> "The evidence ... that punishment was, by law, tied to the offense ... and the evidence that American judges have exercised sentencing discretion within a legally prescribed range ... point to a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense."

Harris, 122 S.Ct at 2418 *quoting* ***Apprendi***, 530 U.S. at 483 n. 10.

> Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," ... the Sixth Amendment requires that they be found by a jury.

Ring v. Arizona, 122 S.Ct. 2428, 2443 (2002) *citing* ***Apprendi***, 530 U.S. at 494, n. 19.

> The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime. See 4 Blackstone 369-370 (after verdict, and barring a defect in the indictment, pardon or benefit of clergy, "the court *must pronounce that judgment, which the law hath annexed to the crime* " (emphasis added)).

Apprendi, 530 U.S. at 478-79.

In Missouri, life imprisonment is the maximum sentence that may be imposed for first degree murder unless the trier finds at least one statutory aggravating circumstance beyond a reasonable doubt. §565.030.4(1), RSMo. (2000) ("The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor: (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032…") This Court has construed §565.030.4(1) to require a finding of at least one aggravating circumstance before a sentence of death may be imposed. *See, e.g.*, ***State v. Taylor***, 18 S.W.3d 366, 378 n.18 (Mo.banc2000) ("once a jury finds one aggravating circumstance, it may impose the death penalty"); ***State v. Shaw***, 636 S.W.2d

667, 675 (Mo.banc1982) *quoting* ***State v. Bolder***, 635 S.W.2d 673, 683 (Mo.banc1982) ("The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence").

Missouri's aggravating circumstances, 'setting the outer limits of a sentence, and of the judicial power to impose it, are the [alternate] elements of the crime [of "aggravated" first degree murder] for the purposes of the constitutional analysis.' ***Harris v. United States***, *supra*, 122 S.Ct. at 2419:

> Any "fact that ... exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" ... would have been, under the prevailing historical practice, an element of an aggravated offense...

Id. at 2417.

As in Arizona, "[Missouri's] enumerated aggravating factors" function as facts that increase "the maximum penalty for a crime" -- first degree murder -- from life imprisonment without the possibility of probation or parole to the ultimate penalty of death and "operate as 'the functional equivalent of an element of a greater offense,' " ***Ring***, 122 S.Ct. at 2443 *citing* ***Apprendi***, 530 U. S., at 494, n. 19.

Although §565.020 ostensibly establishes a single offense of first degree murder for which the punishment is either life without probation or parole or death, the combined effect of §§565.020 and 565.030.4 is to create, in fact, two kinds of first degree murders in Missouri. One is "unenhanced" first degree murder, established by proving a killing

done knowingly and with deliberation, for which the punishment is life without probation or parole. The other is the greater offense of "aggravated" or "capital" first degree murder which requires proof beyond a reasonable doubt of the additional element of at least one aggravating circumstance listed in §565.032.2[10] and for which the authorized punishment increases to include not only life without probation or parole but, also, the

[10] Missouri's 17 statutory aggravating circumstances provide 17 alternate (but not mutually exclusive) elements of the offense of aggravated first degree murder. They do not create 17 distinct offenses but alternate methods by which a defendant may commit the single offense of aggravated first degree murder.

The use of alternate elements providing different methods of committing a single offense occurs throughout Missouri's criminal code. *See*, *e.g.*, ***State v. Lee***, 841 S.W.2d 648 (Mo.banc1992) (569.020, RSMo. 1986, "provides that a person can commit robbery in the first degree by one of several different methods"); ***State v. Davison***, 46 S.W.3d 68, 76 (Mo.App.W.D.2001) ('This statute creates the single crime of "receiving stolen property," which may be committed in different ways"); ***State v. Barber***, 37 S.W.3d 400, 403-04 (Mo.App.E.D.2001) (different means of committing offense of unlawful use of a weapon); ***State v. Pride***, 1 S.W.3d 494, 501 (Mo.App.W.D.1999) ("Forgery is a crime which may be committed in several ways"); ***State v. Jones***, 892 S.W.2d 737, 738 (Mo.App.W.D. 1994) ("a person may commit the crime of third-degree assault of a law enforcement officer in five different ways); ***State v. Burkemper***, 882 S.W.2d 193, 196 (Mo.App.E.D.1994) (two different ways to commit crime of trespass).

ultimate penalty of death.

"An indictment must set forth each element of the crime that it charges." ***Almendarez-Torres v. United States***, 523 U.S. 224, 228 (1998). "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." ***Jackson v. Virginia***, 443 U.S. 307, 314 (1979) *citing* ***Cole v. Arkansas***, 333 U.S. 196, 201 (1948); ***Presnell v. Georgia***, 439 U.S. 14 (1978).

Missouri's Constitution, providing "[t]hat no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies," supports appellant's argument. Art. I, § 17, Mo.Const. It would be odd, indeed, if in all other Missouri cases, the offense must be correctly charged by indictment or information, but in aggravated, capital, first degree murder cases, something less were held to suffice.

"[A] person cannot be convicted of a crime with which the person was not charged unless it is a lesser included offense of a charged offense." ***State v. Parkhurst***, 845 S.W.2d 31, 35 (Mo.banc1992) *citing* ***Montgomery v. State***, 454 S.W.2d 571, 575 (Mo.1970). 'The indictment or information must actually charge that a crime has been committed and '"[t]he test for the sufficiency of an indictment or information is whether it contains all the essential elements of the offense as set out in the statute creating the offense."' ' ***State v. Stringer***, 36 S.W.3d 821, 822 (Mo.App.S.D.2001) *quoting* ***State v. Haynes***, 17 S.W.3d 617, 619 (Mo.App.W.D. 2000) *quoting* ***State v. Pride***, *supra*, 1 S.W.3d at 502.

"To be sufficient, the indictment must also clearly advise the defendant of the facts constituting the offense so that he may prepare an adequate defense and prevent retrial on the same charges in case of an acquittal." ***Id***. *citing* ***State v. Hyler***, 861 S.W.2d 646, 649 (Mo.App.W.D.1993). "If a statute provides that a crime may be committed in several different ways or by differing means, the indictment must state the way in which it was committed." ***Id***. *citing* ***State v. Murphy***, 787 S.W.2d 794, 796 (Mo.App.E.D.1990).

The information filed in this case charged Lewis with two counts of murder in the first degree for knowingly killing Flossie Brewer (Count 1) and William Brewer (Count 2) "after deliberation" but did not charge any aggravating circumstances (LF42-44). The information thus charged the lesser offense of unaggravated first degree murder.

As demonstrated, *supra*, the operation and effect of Missouri's statutes is that the death penalty is authorized only for the offense of "aggravated first degree murder" -- a crime that Lewis was neither charged with, nor convicted of, because the state failed to include any aggravating circumstances in the information. Lewis was charged with, and convicted of, two counts of unaggravated or "simple" first degree murder - an offense punishable only by life imprisonment without probation or parole. As a result, the judge had no authority or jurisdiction to sentence Lewis to death. The sentences of death imposed upon Lewis are unauthorized and violate his rights to due process of law, to notice of the offenses charged, to be tried and sentenced only for the charged offense, and to freedom from cruel and unusual punishment, U.S.Const., Amend's V, XIV, VI, and VIII; Mo.Const., Art I, §§10, 17, 18(a) and 21; §565.030.4(1). The judgment must be reversed, Lewis' sentences vacated and he must be resentenced to life imprisonment

without probation or parole.

<u>As to Point Four</u>: The trial court erred in overruling Lewis' motion for judgment of acquittal at the close of all evidence and entering judgment against him for first degree murder on counts 1 and 2. This violated Lewis' right to due process of law. U.S.Const., Amend's V and XIV; Mo.Const., Art I, §§10. There was no substantial evidence that Lewis planned to kill the Brewers, or deliberated on killing the Brewers or participated in killing the Brewers. Substantial evidence showed only that Lewis was guilty of second degree murder in that Lewis and codefendant Eric Elliott planned to rob the Brewers, Lewis participated in what he thought would be a robbery of the Brewers, but Eric killed the Brewers. Becker's testimony at trial concerning an insupportable statement in his report -- "that they [Lewis and Eric] decided to kill" the Brewers" -- was an unfounded, conclusory opinion -- not fact -- and contradicted by Becker's testimony that 1) Lewis never said he and Eric planned or discussed killing the Brewers, and 2) Becker's own notes do not contain the statement that "they decided to kill" the Brewers.

At the close of all evidence, the defense filed, and the court overruled, a motion for judgment of acquittal at the close of all evidence (LF13,29,194-95). The defense preserved this issue by including it in his motion for judgment of acquittal or for new trial; again, the court overruled it (LF14,272,276; T1326).

The evidence, when viewed in the light most favorable to the verdict, ***State v. Grim***, 854 S.W.2d 403, 411 (Mo.banc1993), did not prove beyond a reasonable doubt that Lewis planned to kill, deliberated on killing, or participated in knowingly killing the Brewers. The evidence proved only Lewis' participation in a plan to rob the Brewers who were

killed by codefendant Eric Elliott in the course of that robbery. Lewis Gilbert was guilty of second degree, felony murder not first degree deliberated murder.

The pertinent evidence at trial, viewed in the light most favorable to the verdict, showed the following:

Lewis and Eric drove from Ohio to Missouri, parked in a field, slept, and upon waking, realized the car was stuck (T863). They decided to go to a nearby house, explain that the vehicle was stuck, and ask to use a phone to call a "wrecker" (T863). At the house, Mrs. Brewer let them in to use the telephone (T863-64). Mr. Brewer was inside on a couch (T863).

Becker testified at trial that Lewis told him that upon realizing there was no phone book "they [Lewis and Eric] decided they were going to kill them [the Brewers]" (T864,882). After talking to the Brewers for about 30 minutes, "one of them" -- Eric or Lewis -- pulled out the .22 (T864). "[T]ogether they tied Mrs. Brewer's hands behind her back" and led her and Mr. Brewer into the cellar (T864). In the cellar, Eric shot Mrs. Brewer three times and she fell onto a wood pile (T864). Eric then shot Mr. Brewer three times (T864). After the shootings, Eric and Lewis found the Brewers' car keys, money, and several rifles (T865-66). They took these things and drove away in the Brewers' car (T866).

Becker also testified that Lewis never said he and Eric discussed killing the Brewers, never said they planned to kill the Brewers before going into their house, and never said they discussed killing the Brewers at the house (T870). Becker's notes of the interview, which he made very close to the time of the interview, did not say that Lewis told Becker

that he and Eric decided to kill the Brewers (T875, 883-84). Becker's notes actually said Lewis stated "he thought that [the Brewers] were killed so there wouldn't be any witnesses" (T876).

"A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." §565.020.1. Deliberation "sets first degree murder apart from all other forms of homicide." ***State v. O'Brien***, 857 S.W.2d 212, 217-18 (Mo.banc1993). "Only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation." ***Id***. at 218. Deliberation may be inferred, ***State v. Malady***, 669 S.W.2d 52, 55 (Mo.App.E.D.1984), but must still be proved beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 316 (1979).

"[I]n passing upon the sufficiency of evidence in a criminal case, the court should take as true all substantial evidence offered by the state together with legitimate inferences to be drawn therefrom." ***State v. Gregory***, 96 S.W.2d 47, 53 (Mo. 1936) (citations omitted). "[T]he cases in which this court will set a side a conviction supported by evidence are rare." ***Id***. "Where the state's evidence is inherently incredible, self-destructive, or opposed to known physical facts, we are perhaps in as good a position to do so as the trial court." ***Id***.

'The doctrine of "destructive contradictions" provides that a witness's testimony loses probative value when his or her statements at trial are so inconsistent, contradictory and diametrically opposed to one another that they rob the testimony of all probative force.' ***T.L.C. v. T.L.C.***, 950 S.W.2d 293, 295 (Mo.App.W.D.1997).

> The doctrine is properly invoked only when the testimony is so "inherently incredible, self-destructive or opposed to known physical facts" on a vital point or element that reliance on the testimony is necessarily precluded.' [Citations omitted.] The doctrine specifically does not apply to contradictions between the victim's trial testimony and prior out-of-court statements, to contradictions as to collateral matters, or to inconsistencies not sufficient to make the testimony inherently self-destructive. [Citations omitted.] Further, it does not apply where the inconsistencies are between the victim's statements and those of other witnesses; the latter types of inconsistencies in testimony simply create questions of credibility for jury resolution. [Citations omitted.]

State v. Wright, 998 S.W.2d 78, 81 (Mo.App.W.D.1999).

Here, the jury had two sources of evidence from which to determine the degree of Lewis's guilt of the charged offenses. One source was Becker's testimony concerning statements Lewis made during his interview (T854-84). The other source was Lewis Gilbert's testimony at trial (T906-53).

Becker's testimony was not substantial evidence under the destructive contradictions doctrine. The first requirement of the doctrine was satisfied in that the testimony was inherently contradictory and inconsistent as to a vital point -- whether Lewis Gilbert knew in advance that the Brewers would be killed and deliberated on their killing. ***Id***. The state's evidence on this point largely came down to Becker's testimony that Lewis said "they decided to kill" the Brewers (T864,882). Becker testified that this -- "they decided to kill them" -- was in his report (T882-83).

But this testimony -- "they decided to kill them" -- was inconsistent with, and contradicted by, Becker's testimony that Lewis never said he and Eric talked about or discussed killing the Brewers (T870). Becker's "they decided to kill them" testimony was further contradicted by Becker's testimony concerning his notes of the interview. Becker testified that during breaks in the interview itself, he wrote down notes of what Lewis had just said (T874). Becker said he took notes in his work as a police officer as an aid to later recall (T874). Becker testified that he did not write in his notes that Lewis said anything about a decision or deciding to kill the Brewers (T875). A final inconsistency was Becker's testimony that his notes said Lewis told Becker that he, Lewis, "thought" the Brewers had been killed so there would not be any witnesses (T876).

The second and third requirements of the destructive contradictions doctrine has also been satisfied in that the contradictions and inconsistencies all went to Becker's trial testimony on a crucial point and did not involve "prior out-of-court statements ... as to collateral matters" or "inconsistencies ... between the victim's statements and those of other witnesses..." ***Id***. The contradictions and inconsistencies in Becker's testimony were fundamental and "sufficient to make the testimony inherently self-destructive." ***Id***.

Becker's testimony was inherently self-destructive. Either Becker was correct when he testified that Lewis told him that he and Eric decided to kill the Brewers, or he was correct when he testified that Lewis never told him that he and Eric discussed the case. Both cannot be true. Becker's testimony that his notes do not contain the statement that "they decided to kill" the Brewers, plus Becker's testimony that Lewis never told him that he and Eric discussed the case, contradict and destroy Becker's testimony that Lewis told

him "they decided to kill" the Brewers. For this reason, Becker's "they decided to kill" testimony is not substantial evidence and may not be used to support the verdict.

The second source of information was Lewis' own testimony. Lewis testified that he and Eric went to the Brewers' house planning to rob them of money and their car (T908). Once in the house, Eric and Lewis asked the Brewers for their car keys and money (T908). In accordance with the plan "to tie [the Brewers] up and put them someplace secure" so there would be time to get away Lewis tied Mrs. Brewer's hands with a telephone cord, put her in a side room in the basement, and went back upstairs (T908,910-11,917). There Eric indicated he was going to tie the Brewers' "feet together so they couldn't move around" (T912). While Lewis was eating a sandwich in the kitchen, he heard shots (T 912). Eric told Lewis he shot the Brewers because "they can identify us" (T913).

The jury could believe or disbelieve this evidence. What the jury could ***not*** do was use disbelief of Lewis' testimony as proof that Lewis knew the Brewers would be killed or that Lewis himself killed the Brewers:

> But in a criminal case, where defendant is presumed to be innocent and where the burden of proof on the state is greater than that on the plaintiff in a civil case, is the effect of disbelief of defendant's explanation the equivalent of proof to the contrary? We do not believe that defendant's failure to explain satisfactorily to the jury permits an inference of guilty knowledge on his part at the required time which will take the place of substantive proof. Certainly in civil cases the effect of disbelief is not proof of the opposite. See ***Zarrillo v. Stone***, 317 Mass. 510, 58

N.E.2d 848, 849, stating, 'On the other hand, mere disbelief of testimony is not equivalent to proof of facts to the contrary'; ***Cruzan v. New York Central H.R.R. Co.***, 227 Mass. 594, 116 N.E. 879, 880, stating, 'Mere disbelief of denials of facts which must be proved is not the equivalent of affirmative evidence in support of those facts.', and ***Eckenrode v. Pennsylvania R. Co.*** (C.C.A.3rd) 164 F.2d 996, 999, aff'd 335 U.S. 329, 69 S.Ct. 91, 93 L.Ed. 41: '* * * But a belief that testimony is false will not support an affirmative finding that the reverse is true. * * *'

State v. Taylor, 422 S.W.2d 633, 637 (Mo.1968).

In the present case, there is no substantial evidence to support the verdict, and Lewis' convictions of first degree murder on counts 1 and 2 must be set aside. Because the jury found Lewis guilty of first degree murder, they never reached the question of whether Lewis was guilty of felony murder, and the cause remanded for further proceedings. ***State v. Whalen***, 49 S.W.3d 181, 187-88 (Mo.banc2001) *citing* ***State v. O'Brien***, 857 S.W.2d 212, 220 (Mo.banc1993).

<u>As to Point Five</u>: The trial court erred in 1) overruling Lewis' motions to preclude the state from seeking death due to the destruction of mitigating evidence and for sentences of life imprisonment, and 2) in imposing death sentences on Counts I and II. This violated Lewis' rights to due process of law, a defense, fundamental fairness, reliable and proportionate sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI, and VIII; Mo.Const., Art. I, §§10, 14, 18(a) and 21; Mo.R.S., §565.035.3(3). Factors that undermine confidence in the reliability of these death verdicts, demonstrate their excessiveness, and require they be vacated include: the lack and questionable nature of the evidence supporting Lewis' convictions; the mitigating evidence concerning Lewis himself; the prosecutor's unsupported, misleading, and prejudicial assertion at penalty phase that Lewis was a serial killer; the failure to suppress and exclude statements Lewis made that did not clearly refer to himself or the offenses charged in Missouri; loss of mitigating evidence resulting from the destruction of state records concerning Lewis' early years, and the fundamental unfairness of proceeding in Missouri after Lewis had been illegally extradited from Oklahoma. The state legislature has established life imprisonment without probation or parole as an appropriate sentence for an aggravated first degree murder; under the Due Process Clause, the Court may not uphold the sentences of death without considering whether the less severe punishment of life imprisonment would be adequate to satisfy the goals of punishment.

Prior to trial, the defense filed a motion to preclude the state from seeking the death

penalty because records containing information about Lewis' background had been destroyed making it impossible to present that information to the jury as mitigating evidence (LF157-60). The trial court received evidence on the motion -- an affidavit showing the destruction of records -- before the penalty phase trial and overruled the motion (T1016-17; DefExL).

The defense timely filed a post-trial motion seeking, in the alternative, acquittal, a new trial, and sentences of life imprisonment (LF272). The motion also included as a point of error, the trial court's ruling denying the defense motion to preclude the state from seeking the death penalty because records containing mitigating evidence had been destroyed (LF279-82). The trial court overruled the motion and imposed sentences of death (T1326).

Appellant has, elsewhere in this brief, argued that his convictions of first degree murder must be reversed because the evidence was insufficient and because various, erroneous, rulings of the trial court resulted in the jury improperly hearing arguments and evidence that prejudiced Lewis and made a difference in the outcome of the first, or "guilt" stage of trial. Even if the Court should disagree and find the evidence sufficient and all error harmless with regard to the convictions of first degree murder, the Court must still determine -- considering the crime, the nature and strength of the evidence, the specific errors occurring at trial, and the defendant himself -- whether the sentences of death imposed in this case violate Lewis' rights to due process of law, freedom from cruel and unusual punishment, reliable sentencing, and proportionate sentencing. U.S.Const., Amend's V, XIV and VIII, ***Cooper Industries, Inc. v. Leatherman Tool Group, Inc***., 532

U.S. 424, 441-43 (2001); ***BMW of North America, Inc. v. Gore***, 517 U.S. 559 (1996) (to determine whether monetary punitive damage award is excessive, Fourteenth Amendment's Due Process Clause requires reviewing court to consider penalties imposed for comparable misconduct; reviewing court may not uphold penalty "on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies[11] could be expected to achieve that goal..." ***Id***. at 584); ***Honda Motor Co., Ltd. v. Oberg***, 512 U.S. 415 (1994) (Due Process Clause requires judicial review of monetary punitive damage awards to ensure they are not "excessive"); ***Ford v. Wainwright***, 477 U.S. 399, 427-28 (1986) (O'Connor, J., conc'g and diss'g); ***Wolff v. McDonnell***, 418 U.S. 539, 557-58 (1974); ***Wilkins v. Bowersox***, 933 F. Supp. 1496, 1524-26 (W.D.Mo.1996); ***State v. Chaney***, 967 S.W.2d 47, 60 (Mo.banc1998); §565.035.3.[12]

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[11] ***State v. Olinghouse,*** 605 S.W.2d 58, 64 (Mo.banc 1980) (retribution remains a "societal goal" of punishment; where defendant is "incapable of [meeting goal of] rehabilitation, life imprisonment is appropriate punishment); ***State v. Mayo,*** 915 S.W.2d 758, 760 (Mo.banc1996) 'goals of punishment" ... are "the twin aims of retribution and deterrence"') *citing* ***United States v. Halper***, 490 U.S. 435, 448 (1989); ***Abell v. State,*** 606 S.W.2d 198, 203 (Mo.App.E.D.1980), Dowd, P.J., dissenting, (identifying criminal punishments as serving "society's goals of protection of property interests and maintenance of order").

[12] "3. With regard to the sentence, the supreme court shall determine:

Although the Court may find that the evidence was "sufficient" to support Lewis' convictions of first degree murder, sufficiency alone is not enough to support a sentence of death. ***State v. Chaney***, *supra*; §565.035.3(3). "[T]he strength of the evidence" in the present case fell below the "compelling nature usually found in cases where the sentence is death" and is inadequate to support sentences of death. ***State v. Chaney***.

There was no evidence that Lewis himself physically killed the Brewers. Moreover, the state's only evidence suggesting that Lewis deliberated was Officer Becker's testimony that Lewis said "they decided to kill" the Brewers (T864, 882). But this is contradicted by other parts of Becker's testimony. Becker testified that his notes of his interview with Lewis -- either taken during or close in time to the interview and Lewis' statements -- did not bear this out; Becker conceded his notes did not say that Lewis said "they decided to kill" the Brewers (T874-75,883-84). And Becker's testimony also conceded that Lewis and Eric did not go into the house planning to kill the Brewers and that Lewis and Eric never discussed killing the Brewers (T869-70). In sum, there were strong reasons for finding Lewis guilty of the lesser offense of second degree felony murder: an offense for which a sentence of death is not an authorized punishment. The

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(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and...

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant."

state's evidence was not strong enough to support, and certainly not compelling of, death sentences.

In considering whether the evidence is strong enough to support the sentences of death, the Court must also consider the reliability of the source of the evidence. As argued elsewhere in appellant's brief, (see, *infra*, Point Six and the accompanying argument), the state's case hung on statements allegedly made by Lewis to Officer Becker. But because Becker coerced Lewis' statements, the credibility of those statements are suspect. ***Crane v. Kentucky***, 476 U.S. 683 (1986). The credibility of Becker's testimony as to the most critical of facts -- whether Lewis knew in advance the Brewers would be killed and deliberated on those killings -- is also suspect because Becker's testimony was not supported by the notes he took during the interview (T875-883). The credibility of Becker's testimony is further diminished because none of Lewis' alleged statements pertaining to the Missouri offenses appear on the tapes Becker made recording the interview (T89). Even if credible enough for a conviction, the statements are not sufficiently credible for a death sentence under the Eighth Amendment.

A further reason for vacating Lewis sentences of death and resentencing him to life imprisonment without probation or parole is that the errors at the guilt phase of trial may have improperly influenced the jury, misled them into convicting Lewis of first degree murder, and, ultimately, sentencing him to death. *See* ***Cooper Industries, Inc.***, *supra*, 532 U.S. at 441-43 (proportionality review required by due process clause must consider effect of errors at trial on jury's determination of punitive damages). One such error, previously discussed in Point 1 and the accompanying argument, *supra*, involves the

verdict directors that improperly posited as fact that Lewis could have been the shooter. No such evidence existed, and, as previously argued, the erroneous instructions would lead the jury to reach a verdict based on speculation, not evidence, and to reject Lewis' defense: that he was guilty of second degree, not first degree, murder. Again, even if this Court should somehow find that the erroneous instructions do not require reversal at the guilt phase, this Court must consider their impact at penalty phase. ***Cooper Industries***, *supra*. The death sentences in this case -- springing from erroneous instructions unsupported by facts -- are unreliable, are not sentences in which the Court can have confidence, and violate the Eighth and Fourteenth Amendments. The Eighth Amendment exacts a 'heightened "need for reliability in the determination that death is the appropriate punishment in a specific case."' ***Caldwell v. Mississippi***, 472 U.S. 320, 340 (1985) *citing* ***Woodson v. North Carolina***, 420 U.S. 280, 305 (1976).

Errors directly bearing on the penalty phase further undermine confidence in the sentences of death. One such error was the assistant attorney general's "serial killer" comment during opening statement addressed in Point Seven and the corresponding argument, *infra*. This error enhanced the unreliability of the death verdicts by arousing the jurors' passions and fears and giving them an unwarranted, non evidentiary reason for sentencing Lewis to death.

In addition, not only was it error to permit the state to seek death against Lewis despite the destruction of records containing mitigating evidence, it was a violation of defendant's rights to due process of law, reliable sentencing, and freedom from cruel and unusual punishment.

Appellant is not contending that the state of Missouri was at fault for the destruction of records in Oklahoma, or that the state of Missouri should be sanctioned for such loss. *Cf.* ***State v. Chambers,*** 891 S.W.2d 93, 113 (Mo.banc1994). Rather, appellant is arguing that his ability to present a full picture to the jury was precluded by the loss of this evidence. Because it was unique, "the lost evidence possesse[d] attributes of particular importance" to the jury's decision and "to the appeal" that was not duplicated at trial by the testimony of experts who examined Lewis as an adult or the testimony of lay witnesses who knew Lewis. ***State v. Weston,*** 912 S.W.2d 96, 102 (Mo.App.S.D.1995). For this reason, "there is a reasonable possibility that the outcome of the appeal would be different had the evidence not been lost." ***Id***.

Appellant is cognizant that in 1984, in ***Pulley v. Harris***, 465 U.S. 37 (1984), the Supreme Court held that the Eighth Amendment did not require state appellate courts to conduct a "comparative" proportionality review in which the court would "compare the sentence in the case before it with the penalties imposed in similar cases." ***Id***. at 43-44.

> Traditionally, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime... [T]his Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime.

Id.

Recently, in ***Atkins v. Virginia***, 122 S.Ct. 2242 (2002), in determining whether the Eighth Amendment prohibited sentencing a mentally ill defendant to death, the Court did

not look at whether a particular sentence was "proportionate" with regard to "a particular crime or category of crime." Rather, the Court was concerned with whether the sentence in question -- the death penalty -- was proportionate or excessive with regard to a particular defendant. ***Atkins*** held that executing a mentally retarded offender was an "excessive" punishment prohibited by the Eighth Amendment. ***Id***. at 2252. The Court's proportionality review in ***Atkins*** thus departed from the traditional proportionality review of ***Pulley*** and embraced the comparative review rejected by ***Pulley*** but approved in a recent line of cases including ***Cooper***, *supra*, ***BMW***, *supra*, and ***Honda***, *supra*.

If the Fourteenth Amendment requires comparative proportionality review in civil cases -- where the "punishment" involves the defendant's money not the defendant's life -- can it require any less in capital murder cases where the punishment in question is death? The answer is that in capital cases the Fourteenth and Eighth Amendments require comparative proportionality review that will consider similar cases with "similar" determined by the facts of the case including but not limited to the circumstances of the crime, the defendant, the mitigating evidence, and the aggravating evidence.

Meaningful proportionality review, in which the Court must consider all other "similar" cases and not only those in which a sentence of death was imposed, is required by the Fourteenth Amendment and by the Eighth Amendment. ***Cooper Industries, Inc.*** *supra*; ***BMW***, *supra;* ***Honda***, *supra*. "Similar" cases should include cases with similar facts regardless of the sentence ultimately imposed. ***BMW***, 517 U.S. at 583-85.

Truly meaningful proportionality review will require creation of a database accessible to the Court as well as to the Attorney General's Office and attorneys representing a

death-sentenced appellant. Pending implementation of such a database, and an opportunity for further briefing on the issue of the proportionality of the sentence of death imposed upon Lewis Gilbert, the Court should suspend proceedings in the instant case.

Finally, this Court must also consider the defendant. ***Cooper Industries, Inc***., *supra*; §565.035.3(3). Lay and expert witnesses documented Lewis' limited mental abilities including borderline IQ scores (the highest overall IQ score ever recorded for Lewis was 84 which is at the upper end of the borderline category, T1215), his abnormal cognitive, emotional, and psychological development (T1247-76), and the numerous problems that began in his childhood and continued to and beyond the time of the crime (T1103-1276). The testimony of these witnesses comprised considerable evidence of the repeated physical and emotional abuse Lewis sustained beginning at a very young age and how it affected him: beatings that left Lewis bloody, the behavior changes and brain injury resulting from repeated head injuries (or, perhaps, a congenital condition), a serious asthma attack in which he lost consciousness and his heart stopped beating, the ridicule and rejection he endured within his own home and at school, and the considerable mental disabilities requiring him to attend special education classes and repeat grades (T1103-1276). Unfortunately, the prosecutor chose to denigrate and belittle this evidence as "psycho stuff" that the defense was using "as excuses" for Lewis' offense (T1305); the prosecutor thus discouraged the jury from considering the mitigating evidence in determining whether death was an appropriate sentence for Lewis.

But this Court is bound to consider all the evidence in its review to determine if the sentence of death imposed on Lewis is disproportionate and excessive. The legislature

has decreed that a sentence of life imprisonment without probation or parole is, in the appropriate case, an adequate and sufficient sentence for first degree murder.

For the foregoing reasons, the Court should find that this is an appropriate case for a sentence of life imprisonment without probation or parole, that Lewis' sentence of death is excessive and disproportionate, and re-sentence him to life imprisonment without the chance of probation or parole.

<u>As to Point Six</u>: The trial court erred in overruling Lewis' motions to suppress and exclude his statements, his objections at trial, and admitting -- at both phases of trial -- Officer Becker's testimony concerning his interview with Lewis and statements Lewis made, and plainly erred in allowing the prosecutor to highlight Lewis' silence and failure to make statements in his closing argument. This violated Lewis' rights to due process of law, silence and non-incrimination, freedom from cruel and unusual punishment and reliable sentencing. U.S.Const.,Amend's V, VIII, and XIV; Mo.Const., Art. 1, §§10, 19, and 21. The state did not prove by a preponderance of evidence that Lewis knowingly, intelligently and voluntarily waived his constitutional rights and that his statements were made knowingly, intelligently and voluntarily. Officer Becker never read or showed Lewis the "waiver" section of the rights waiver form, never asked Lewis to waive his rights, and never asked Lewis to sign the waiver form to indicate he desired to waive his rights. Without notifying Lewis, Officer Becker signed Lewis' name on the waiver form. Lewis' comments show he did not know or understand his right to end the questioning ("I expect to get interrogated"), did not waive his rights and invoked them ("I don't see any point in doing it..." "I don't know, I just need, before I even tell my side of the story, I need to know what I'm up against, you know, how's it going to benefit me or whether it's going to do me harm...") That Officer Becker ended the interview because Lewis refused to talk about the incidents also shows Lewis invoked and did not waive his silence and non-incrimination rights. Officer Becker tricked, and coerced Lewis to make a statement, after extended questioning, by telling him, "The

truth will set you free." Admission of Lewis' statements and of Becker's testimony and the state's argument about Lewis' failure and refusal to talk about the offenses prejudiced Lewis by highlighting his invocation of rights and failure to give statements about the offense.

Prior to trial, the defense moved to suppress and exclude statements Lewis made when interrogated by Officer Becker and tapes of the interrogation (LF55-59,133-41,147-51,168-74). On September 18, 2001, having heard evidence on defendant's motion to suppress (LF55-59), defendant's motion in limine in connection with motion to suppress (LF133-41), and defendant's supplement to motion to suppress (LF147-51), the trial court overruled the motion to suppress finding "the statements made by the defendant to Agent Daniel Becker were freely and voluntarily made after the defendant had been advised of his rights, understood those rights and waived those rights" (LF8). With regard to the motion in limine, the court excluded from guilt phase statements concerning homicides in Ohio or Oklahoma and "bad acts not directly related and relevant to the homicide with which defendant is charged" in Missouri" (LF8-9).

At both phases of trial, defense counsel timely objected before the state elicited evidence of Lewis' statements to Becker (T854,1032-33). The trial court overruled the objections but ruled they would continue (T854-55,1033).[13] Appellant preserved this

[13] The defense did not object to the prosecutors' arguments; appellant respectfully requests that the Court, insofar as it deems it necessary to do so, review this part of the point and argument for plain error. Rule 30.20.

point for appellate review by including it in the motion for new trial (LF294-96).

Evidence from the pretrial hearing and the trial showed the following:

Officer Becker went to the district office in Santa Fe to interview Lewis Gilbert (T59-63). Another officer had begun interviewing co-defendant Eric Elliott, rather than Lewis, because Lewis was not cooperative; the "not being cooperative" behavior occurred before Becker arrived at the Santa Fe office (T80-81). Becker's instructions were "to attempt to interview Lewis Gilbert" (T82).

Becker read the "***Miranda*** rights"[14] to Lewis from a printed, two-part form (T64,83; StMtnEx3; DefExH).[15] The first section was titled "Your Rights" (T83; StMtnEx3). Becker read that entire section to Lewis (T83). After reading the rights, Becker asked Lewis "if he understood" and Lewis said he did (T65,851).

A separate section was titled "Waiver of Rights" (T83,853; StMtnEx3, StEx75). Becker never read the "Waiver of Rights" section to Lewis and did not give the Waiver of Rights form to Lewis to read (T66-67,83). Becker never asked Lewis to waive his rights (T66).

At the bottom of the "Waiver of Rights" section was a signature line (T83-84; StMtnEx3; StEx75). Becker printed Lewis' name on that line (T83; StMtnEx3, StEx75). Becker never asked Lewis to sign the waiver section; he never gave Lewis a chance to

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[14] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[15] The "Rights" form was renumbered at trial and admitted as StEx75 (T852-53). An enlargement of the form was admitted as DefExH.

say "yes or no" to signing the waiver (T84). Becker never asked Lewis if he, Becker, could sign the waiver form for Lewis (T84). Lewis did not sign the form to waive his rights (T852).

Oddly enough, even though Lewis never signed the form, Becker signed his own name to the form as a "witness" to Lewis' signature (StMtnEx 3).

Becker testified that standard policy is to have the person being interrogated sign the waiver form (T868). Becker claimed Lewis did not sign the "rights waiver" because he "was handcuffed behind his back" (T66,852). At the end of the interview session, when Lewis was handcuffed in front, Becker did not ask Lewis to sign the form (T85).

Becker said Lewis was cuffed for security; a number of police officers were present "down the hall and in other offices" (T85). Occasionally another officer, Pat Wood, was in the interview room to give Lewis a cigarette or to take him to smoke (T85-86). Lewis was "uncuffed" to smoke but not to sign the waiver (T85,867-68). Becker could have alleviated any security concerns by having another officer present while Lewis was signing the form (T868).

Asked how he "ascertain[ed]" that Lewis was willing to speak with him, Becker testified, "I simply asked him" and "He said, 'yes'" (T67). The tape of the interview does not confirm Becker's testimony (StMtnEx's2,4). The tape shows that when Becker asked Lewis if he would make a statement, Lewis did not agree; Lewis invoked, and never waived, his rights.

As the following shows, Lewis Gilbert's responses to Becker are hardly those of a person who is "willing to give" a statement. There is no semblance to "voluntary"

statements. The entire interview consists of Becker persisting in his attempts to extract statements from Lewis -- and Lewis resisting:

Becker: Okay are you willing to give me a statement?

Gilbert: It depends on what you want.

Becker: Well I just want to ask you about what's going on here? There's some speculation now that you might have killed some people, that sort of thing, that's what I want to talk to you about?

Gilbert: Where's my friend?

Becker: He's in the building.

Gilbert: Is he still alive?

Becker: He's alive.

Gilbert: What do you want to know?

Becker: Are you willing, is it okay, you want to talk?

Gilbert: I'll say something, but I ain't going to say everything.

(StMtnEx's2,4).

Lewis never said or indicated that he wanted to talk to Becker or that he "intentional[ly] relinquish[ed] or abandon[ed]" his constitutional right to remain silent. ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938).

Becker began the interview by asking Lewis if he knew anything about a lady who was missing in Ohio; Lewis denied knowledge and declined to answer questions about Ohio saying "Next question... Next question... Next question..." (StMtnEx's2,4). Becker encouraged Lewis to talk about the incidents, but Lewis consistently declined and

indicated he did not want to talk:

Becker: Basically all the information I know about this I got on the news last night, and these are pretty serious charges you know against you and him. And this is just an opportunity for you to explain yourself. And evidently they know something, the police in these other states.

Gilbert: I don't worry about names and pictures. I could talk and say whatever you want me to say but I don't know if I'm being (inaudible)[16] whatever, you know what I'm saying. I don't know what's going to happen to me. If I say whether, if I say (inaudible)[17] I'm going to be still fucking, I may still go to, you know get (inaudible)[18] so what's the difference.

* * * * *

Becker: You know it boils down, if what's been happening is true, the way these other law enforcement agencies have been stating, ah, you know it boils down to one of two things, either you're, either you killed these people out of self defense or some justifiable reason, or you're just a cold-blooded killer, you and him, which is it?"

Gilbert: One or the other, one of them.

Becker: It's one of them, don't want to tell me about it?

Gilbert: I don't see any point in doing it, I mean I, what am I going to gain in doing it,

[16] The inaudible word could be: "legal..."

[17] The inaudible words could be: "my side of the story..."

what am I going to huh?

(StMtnEx's2,4).

Becker told the jury that Lewis "would avoid answering a lot of my questions" (T860). Instead, Lewis asked non-responsive questions and gave non-responsive answers (T70-71,860; StMtnEx's2,4). Lewis "would answer a question by asking [Becker] a question completely off the subject" which made Becker think that Lewis was not "following" the questions (T71); for example:

Becker: Well you've heard the expression that the truth shall set you free,[19] now this is your opportunity, I mean do you want to carry this around with you for the rest of your life? I mean do you want your child growing up ah, thinking that ah, all these accusations are true, or do you want to tell me what happened?

* * * * *

Becker: I mean the, the information I've received about this whole ordeal is pretty one sided, I mean pretty one sided against you, and this is just a chance for you to tell me your side of the story?

Gilbert: Can I smoke in here?

(StMtnEx's2,4). Non-responsive answers and confusion on the part of the person being

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[18] The inaudible words could be: "the death penalty..."

[19] Becker admitted that he told Lewis "the truth will set you free" not to help Lewis feel better but because he wanted Lewis to talk about the incident and confirm or deny the allegations (T88).

interrogated have been recognized as indications that a statement may not be voluntary. ***Henry v. Kernan***, 197 F.3d 1021 (9thCir.1999).

Becker attempted to trap Lewis into admitting that he had killed someone:

Becker: I don't know if they're allowed to smoke in cells, or if they've got a certain area you can go to smoke or what. So you did kill somebody you're saying?

Gilbert: I didn't say that.

Becker: Well you told me that either I asked you if either you're a cold-blooded killer or you did kill somebody out of some justifiable reason, and you said it's one of them.

Gilbert: I said it's one of them.

Becker: So you killed somebody right?

Gilbert: I didn't say...

Becker: Or was it some justifiable reason?

Gilbert: But we're talking about me and him both, right, me and the other dude both, right?[20]

Becker: Um hum, but you're in this together.

Gilbert: "We're in this together, yes, but that doesn't mean we both of us killed

[20] On the tape, Lewis appears to say: "But we're talking about me and him both, right, me and the other dude both, right?" The transcript, however, reads: We're talking about me and him both right and the other people right?

somebody." [21]

Becker: Did he kill somebody?

Gilbert: I don't know, I, before I even tell my side of the story, I need to know what I'm up against, you know, how's it going to benefit me or whether it's going to do me harm?

Becker: Well I'm telling you what you're up against, murder charges, you're being accused of murder, and I'm not sure how many people...

Gilbert: (Inaudible....) anyways...

Becker: Two or three or four people, something like that.

Gilbert: I'll be accused of murder anyways, they ain't going to let me out of here.

Becker: That could be, that could be...

(StMtnEx's2,4).

Lewis did not realize that he could decline to be questioned or that he could end the interview:

Becker: I want you to tell me about what happened?

Gilbert: Are you nervous?

Becker: Are you?

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[21] Several words here are unclear. The tape and Becker's response suggest the words are: "We're in this together, yes, but that doesn't mean we both of us killed somebody" or "We're in this together, yes, but that doesn't mean we both have to kill somebody." The transcript reads: "We're in this together yes, and (inaudible) both of us killed somebody."

Gilbert: Yea this is the first time I've ever been through this shit. Hell I expect to get interrogated.

(StMtnEx's2,4).

Approximately one hour after Becker started questioning Lewis, he ended the interview and left the room (T74; StMtnEx's2,4). Becker said he was finished because Gilbert refused to answer questions (T93). Becker reported, "After slightly less than an hour, I decided to discontinue the interview because he refused to answer my questions" (T93). Testifying at Lewis' trial in Oklahoma, Becker confirmed that Lewis refused to answer questions:

I turned it off initially because I felt that we were about at the end of our interview. He refused to respond to the questions that I asked, and I felt like I had gotten to the point where I wasn't going to obtain any more information.

(T94-95). Lt. Bowen told Becker to put Lewis into another office; as no other offices were then available, Becker left Lewis where he was and a minute or two later began to question him again (T74,93).

Becker testified that it was not clear whether discussions of killings on the tape referred to Missouri or incidents in other states (T89). On the tape, Becker mentioned several states and told Lewis that he was "accused of three or four counts of murder in various states" (T89-90). The " admissions" that Becker said Lewis "made concerning Missouri" were not on the tape (T89).

"At a suppression hearing the state bears both the burden of producing evidence and the risk of non-persuasion to show by a preponderance of the evidence that the motion to

suppress should be overruled." ***State v. Franklin***, 841 S.W.2d 639,644 (Mo.banc1992). "Once the admissibility of a statement has been challenged, the State has the burden of proof to demonstrate by a preponderance of the evidence that the statement was voluntary." ***State v. Smith***, 944 S.W.2d 901, 910 (Mo.banc1997) (*citation omitted)*. "[E]vidence presented on a motion to suppress is reviewed in the light most favorable to the ruling." ***Id***.; *citation omitted.* Appellate review determines only "whether the evidence is sufficient to support the ruling...;" a "clearly erroneous" ruling will be reversed. ***State v. Trenter***, 2002WL1899918 (Mo.App.W.D.Aug.20,2002).

Viewed "in the light most favorable to the ruling," the evidence failed to prove by a preponderance of the evidence that Lewis' statements were made voluntarily, intelligently, and knowingly after a valid waiver of his right to remain silent. To the contrary, a preponderance of the evidence showed that Lewis exercised his right to remain silent, never waived this right, and his statements to Becker resulted from violations of the of the Fifth and Fourteenth Amendments and ***Miranda***, *supra*.

The starting point for determining whether an accused statement's must be suppressed is ***Miranda v. Arizona***, *supra*. ***Miranda*** and, recently, ***Dickerson v. United States***, 530 U.S. 428, 439-40 (2000), set out the constitutional requirements pertaining to "warning" and "waiver."

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made

voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, ***if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned***.

Miranda, 384 U.S. at 444-45 (emphasis added).

[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained... [W]here in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.

Id. at 475- 76.

'"The requirement of warnings and waiver of rights is ... fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation..."'

Dickerson, 530 U.S. at 440, n. 4.

Articulating these constitutional requirements is far easier than determining whether, in a specific case, the defendant waived or invoked his rights:

> The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the ***Miranda*** case. As was unequivocally said in ***Miranda***, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

North Carolina v. Butler, 441 U.S. 369, 373 (1979).

Regarding invocation of the right to ***counsel***, the Supreme Court has held "the suspect must unambiguously request counsel [by] ... articulat[ing] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." ***Davis v. United States***, 512 U.S. 452, 459 (1994).

The Court has never required such unambiguous invocation of the rights to silence and non-incrimination. ***Doyle v. Ohio***, 426 U.S. 610 (1976), explains why it would be at odds with the nature of those rights, and with ***Miranda***, to require an accused to speak to effectuate his right to silence:

> The warnings mandated by that case [***Miranda***] ... require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed

> counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested... Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings.

Id. at 617-18.[22]

It follows that, unlike the right to counsel, the right to remain silent and to not incriminate one's self need not be expressly invoked. Likewise, waiver of the right to remain silent may not be presumed from silence. "Silence in the wake of [***Miranda***] warnings may be nothing more than the arrestee's exercise of these Miranda rights." ***Id***.

Appellant is cognizant that some appellate courts have held that the "unambiguous request" required to invoke the right to counsel is also required to invoke the right to remain silent. *E.g.*, ***In re Frederick C.***, 594 N.W.2d 294, 301-02 (Neb.App.1999) (citing

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[22] *See also* ***Wainwright v. Greenfield***, 474 U.S. 284, 292 (1986):

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony... [T]he State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized.

cases). Missouri has never so held, and, as ***Doyle***, *supra*, explains, there are sound reasons against extending this requirement. It would simply not make sense to assure a person, "You have the right to remain silent," but require that he break his silence to invoke that right.

Even if this Court should decide that to invoke his right to remain silent and not incriminate himself, an accused must "unambiguously" announce his silence and intent to not incriminate himself, a "reasonable police officer" in the circumstances of this case "would understand" that Lewis invoked his rights. ***Davis***, *supra*. Becker's own testimony proves the point.

Becker admitted ending his interview because Lewis "refused to talk" -- thus recognizing that Lewis invoked his rights (T93-95, 856-57,860). Lewis invoked his rights to silence and non-incrimination at the outset of the interview: "I'll say something but I ain't going to say everything" (StMtnEx's 2,4). For the next hour (T74, StMtnEx's 2,4), Lewis never relinquished those rights. During the hour-long interview, before Becker conceded that Lewis was refusing to talk, Lewis continually relied on and invoked his rights to silence and non-incrimination:

> "I could talk and say whatever you want me to say but I don't know if I'm being (inaudible) whatever, you know happen to me. If I say whether, if I say (inaudible)[23] I'm going to be still fucking I may still go to, you know and get the death penalty."
>
> "I don't see any point in doing it, I mean I, what am I going to gain in doing it,

what am I going to, huh?"

"That's [not answering Becker's questions] not running, in a way it's being clever, because it may hurt you [Lewis himself] in the long run, you know what I'm saying?"

"I don't know, I just need ... before I even tell my side of the story, I need to know what I'm up against, you know, how's it going to benefit me or whether it's going to do me harm?"

[In response to Becker asking Lewis if he was not telling Becker what was going on because Lewis was a coward]: "it might be smart huh, cause I don't know you."

"I don't know if it's going to benefit me and benefit, or go against me." (StMtnEx's 2,4).

Each of Lewis' refusals to make statements about the offenses was an "indicat[ion] ... that he [did] not wish to be interrogated...," that he wished to remain silent, and an invocation of his rights. ***Miranda**, supra,* 384 U.S. at 445; ***United States v. Wallace***, 848 F.2d 1464, 1475 (9thCir.1998) (defendant indicated that she did not wish to be questioned by not responding to officer's questions).

A case similar to the present case is ***State v. Crump***, 834 S.W.2d 265 (Tenn.1992). Crump 'respond[ed] to ***Miranda*** warnings with "I don't have anything to say.'" ***Id***. at 269. Thirty minutes later officers drove him along his escape route and questioned him for thirty to forty-five minutes. ***Id***. The Tennessee Supreme Court found this "an

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[23] Possibly: "my side of the story..."

impermissible resumption of in-custodial interrogation which caused the admissions made by Crump during the drive to be inadmissible." ***Id***.

The North Carolina Supreme Court considered a similar situation in ***State v. Murphy***, 467 S.E.2d 428 (N.C.1996). Murphy worked at a meat processing plant with the victim; the victim, who was involved in Murphy being fired for misconduct on the job, was killed the day after Murphy was fired. ***Id***. at 429-30. The police, who had Murphy in custody on other charges, gave him ***Miranda*** warnings, and Murphy talked about the events that led to his being fired. ***Id***. at 431, 433. The officers told Murphy that he would be charged with killing the victim, and he twice denied knowing anything about it. ***Id***. When an officer offered to stay and talk to Murphy about the incident, Murphy said, "I got nothing to say, man." ***Id***.

Fifteen minutes later, while defendant was being "processed" at the police station, another officer 'encouraged [Murphy] to "tell the truth," stating that the bad feeling in defendant's stomach would not go away until he did.' ***Id***. Murphy replied, '"Man, you know the position I'm in, I can't tell you about it."' ***Id***.

The North Carolina Supreme Court held that Murphy's 'conduct, in abruptly standing up, combined with his unambiguous statement, "I got nothing to say," were clear indicators that he wished to terminate the interrogation and invoke his right to remain silent.' ***Id***. at 434.

Several aspects of ***Murphy*** are of particular interest here. The ***Murphy*** Court relied on the officers' actions in finding that Murphy had invoked his right to silence. '[T]hat the interrogating officers immediately ceased the interrogation and took the defendant to

be "booked" makes it equally clear that the officers understood that the defendant was terminating the interrogation and invoking his right to remain silent.' ***Id***. Likewise, in the present case, Becker stopped the interview because "Lewis refused to answer [his] questions" (T93-95).

In ***Murphy***, the Court relied on the fact that "reasonable police officer[s] in the circumstances" understood Murphy was invoking his rights. ***Davis v. United States***, *supra*, 512 U.S. at 459. So too, "in the circumstances" of the present case, a "reasonable officer" understood Lewis was invoking his rights (T93-95). ***Id***. The renewal of questioning in ***Murphy***, as in the present case, is also significant. In ***Michigan v. Mosley***, 423 U.S. 96 (1975), the Supreme Court considered whether ***Miranda*** prohibited officers from ever reinitiating questioning of a suspect who had "indicate[d] in any manner, at any time prior to or during questioning, that he wishes to remain silent..." ***Id***. at 101 citing ***Miranda***, 384 U.S. at 473-74. Although a "momentary cessation" of questioning "would clearly frustrate the purposes of ***Miranda*** by allowing repeated rounds of questioning to undermine the will of the person being questioned," the Court said ***Miranda*** could not "sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." ***Id***. at 102-03. ***Mosley*** identified ***Miranda***'s "critical safeguard" as

> a person's "right to cut off questioning..." Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation... [T]he admissibility of

> statements obtained after the person in custody has decided to remain silent depends under ***Miranda*** on whether his "right to cut off questioning" was "scrupulously honored."

Id. at 103-04 *citing* ***Miranda***, 384 U.S. at 479, 474.

In ***Mosley***, the Court found that because the officers immediately ended the questioning when Mosley indicated he wished to remain silent, then waited two hours and readvised him of his ***Miranda*** rights -- thus giving him a "full and fair opportunity to exercise those options" -- before reinitiating questioning, Mosley's rights had been "scrupulously honored." ***Id***. at 104-07.

In ***State v. Bucklew***, 973 S.W.2d 83 (Mo.banc1998), relying on ***Mosley***, *supra*, this Court identified five factors "to determine whether the right to remain silent was scrupulously honored..." They are 1) whether police ceased interrogation immediately, 2) whether questioning resumed only after both a significant period of time and "fresh ***Miranda*** warnings," 3) whether the subsequent interrogation was intended to wear down the suspect and change his mind, 4) the number of subsequent interrogations, and 5) "whether subsequent questioning involved the same crime." ***Id***. at 88. This Court found Bucklew's rights were "scrupulously honored" because 1) interrogation ceased immediately, 2) it was not reinitiated for five days and was preceded by fresh ***Miranda*** warnings, and 3) the motive was not to wear down the defendant. ***Id***. at 88-89.

But in ***Murphy***, and even more so in the present case, there was merely "momentary cessation" of questioning. In ***Murphy***, "[t]he agents questioning the defendant in the initial interview immediately ceased their interrogation after defendant invoked his right

to remain silent." 423 S.E.2d at 434-35. Within fifteen minutes, a police officer initiated questioning again without readvising ***Murphy*** of his rights. ***Id***. at 435. The Court in ***Murphy*** correctly found that Murphy's 'right to cut off questioning was [not] "scrupulously honored.'" ***Id***.; *see also* ***Crump***, *supra*, 834 S.W.2d 269.

Nor, in the instant case, was Lewis' "right to cut off questioning ... scrupulously honored." Instead, moments after ending the initial interview, without readvising Lewis, Becker re-initiated questioning (T93). Becker had stopped the tape because (as he wrote in his report) Lewis refused to answer questions (T93). But "a minute or two later [Becker] went back to speak with [Lewis] some more" (T93).

With regard to the "wear down" factor, Becker admitted he was trying to "wear down" Lewis. Becker said that as the interview went on, he was able "to direct [Lewis] to talk about the murders here in Missouri" (T863). Becker admitted he told Lewis, "the truth will set you free" to get Lewis to talk (T88). Becker manipulated Lewis' emotions to get him to talk; he asked Lewis "do you want your child growing up ah, thing that ah, all these accusations are true, or do you want to tell me what happened?" (StMtnEx's 2&4).

The record shows that Becker failed to honor, "scrupulously" or otherwise, Lewis' invocation of his rights to silence and to end questioning.

Even if this Court should decide that Lewis never invoked his rights, Lewis at no time waived his rights. "'[I]ndulg[ing] every reasonable presumption against waiver,'" the state failed to prove "an intentional relinquishment or abandonment" by Lewis of his rights to silence and non-incrimination. ***Johnson v. Zerbst***, *supra*, 304 U.S. at 464.

That Lewis stated he would "say something" but wouldn't "say everything," and that

Lewis talked with Becker and gave responses to some questions fails to establish that Lewis waived his rights.

> A suspect who wishes to exercise his right to remain silent need not remain mute. A suspect does not waive his right to remain silent by engaging in a conversation about the weather with an officer. Likewise, a suspect does not waive his right to remain silent by asking the officer about the crime with which he has been charged. A suspect waives his right to remain silent, for purposes of the [F]ifth [A]mendment, when the suspect discusses his role in the offense or offers an exculpatory story or alibi.

Bass v. Nix, 909 F.2d 297, 301 (8thCir.1990) (overruled in part on other grounds).

Eventually, after repeated questioning and coaxing, after Becker at one point had ended the first, hour-long, interview because Lewis refused to talk, and after the tape ran out, Lewis made statements about the Missouri offenses, *see supra*. But merely because an accused "may have answered some questions or volunteered some statements" does not establish a waiver of rights. ***Miranda***, 384 U.S. at 445. Nor does the fact that the defendant eventually confesses establish a valid waiver. ***Id***. at 475.

In ***United States v. Wallace***, *supra*, defendant Wallace was advised of her rights and "for a time" did not respond to a DEA agent. 848 F.2d at 1475. Eventually Wallace twice denied selling drugs; these denials were introduced at her trial. ***Id***. The Court noted the lack "of an express waiver of ***Miranda*** rights and that "[i]n the face of repeated questioning..." Wallace "maintained her silence for several minutes and, perhaps, as many as ten minutes." ***Id***. The Court found that Wallace's "initial refusal to respond"

was an "indicat[ion] ... that [s]he wishe[d] to remain silent" such that continued questioning violated ***Miranda***. ***Id***.

In contrast to the defendant's 10-minute silence in Wallace, here, for at least an hour, Lewis "refused" (Becker's own word) to answer questions. As in ***Wallace***, the fact that Lewis eventually made statements does not establish waiver.

An additional reason that Lewis' statements should be suppressed is that they were not voluntary because they were induced by Becker telling Lewis that telling the truth would set him free (T88; StMtnEx's 2&4). Confessions induced by "any direct or implied promises..." have long been recognized as involuntary. ***Bram v. United States***, 168 U.S. 532, 542-43 (1987). When a promise made by the police overbears the will of the defendant, the promise is coercive and the confession thus produced is involuntary. ***Arizona v. Fulminante***, 499 U.S. 279, 288 (1991). In determining whether a confession is voluntary, a reviewing Court must consider the "totality of the circumstances." ***Id***. at 285-86.

Advising a suspect of his rights as required by ***Miranda*** does not ensure that a subsequent statement has been freely and voluntarily made and will not immunize a post-***Miranda*** statement from scrutiny. ***Collazo v. Estelle***, 940 F.2d 411 (9th Cir.1991); ***State v. Vinson***, 854 S.W.2d 615 (Mo.App.S.D. 1993) (post-***Miranda*** statements of defendant made in exchange for prosecutor's promise to provide immunity from prosecution held not voluntary); *see also* ***State v. Williamson***, 99 S.W.2d 76 (Mo. 1936) (defendant's written confession to murder was not voluntary where it was induced by sheriff's and deputy's promises that they would recommend that defendant be returned, as he wished,

to Illinois State Penitentiary).

As shown above, Lewis' statements were the product of violations of his Fifth and Fourteenth Amendment rights and were inadmissible. Lewis invoked his rights, never waived his rights, and Officer Becker coerced Lewis to make statements by telling him the truth would set him free.

Mere error is not sufficient to warrant reversal; for the reasons that follow, the error in the present case in admitting evidence of Lewis' interview and statements was not harmless beyond a reasonable doubt, prejudiced Lewis, and requires reversal. ***Arizona v. Fulminante***, *supra*, 499 U.S. at 295.

The evidence admitted included not just Lewis' statements - although that, alone, would warrant reversal - but also evidence highlighting Lewis' invocation of his rights and his refusal to admit his guilt. Testimony about Lewis' invocation of his rights included Becker's testimony that he ended his interview after an hour because Lewis was not divulging much information (T856), that Lewis "wasn't going to tell Becker everything" (T857), that when Becker "tried" to ask Lewis about Ohio, Lewis said, "Next question" (T857), that Becker could not "direct the interview" in "a straight line" because Lewis "would avoid answering a lot of [Becker's] questions" (T860).

Becker also testified that Lewis eventually told him that the murders in Missouri were "a 50-50 deal", that Lewis said "he knew that he was leaving a trail in his travels from Ohio to New Mexico" and "that a dead person can't report a stolen vehicle" (T862).

Becker testified that Lewis told him the following: The car he and Eric were using got stuck in a field, so they decided to go to a house and ask to use the phone to call a

"wrecker" (T863). An elderly couple was at the house, and once inside Lewis and Eric decided to kill them (T863-64). After talking to the couple for perhaps as long as thirty minutes, Eric or Lewis pulled out a gun and tied the lady's hands behind her back (T864). When the lady and the man were both in the cellar, Eric shot them each in the head three times (T864). Eric found two hundred dollars cash, several rifles, and keys that fit a car parked outside the house (T865-66). Lewis and Eric took the rifles, the money and left in the car (T866). Lewis said the couple "didn't deserve it" (T866).

Becker testified that when he asked Lewis if he had done the murders in self defense or some other justifiable reason, or if he was a cold-blooded killer, Lewis said, "One of them. One or the other." (T865).

At penalty phase, Becker testified to statements Lewis made concerning the murders in Oklahoma and Ohio (T1033-43). As to the Oklahoma murder, Becker testified Lewis told him that after leaving Missouri, he and Eric went to a lake and park near Oklahoma City (T1034). Upon spotting a woman fishing and her vehicle, "their intention was to steal the vehicle so that the police would be thrown off their trail (T1035). The spoke with the woman, who said she had AIDS, for ten to fifteen minutes (T1035). Lewis told Becker "that dying from the AIDS virus is a painful and undesirable way to die, and he seemed to justify killing her" (T1035-36). The woman pleaded for her life, and said she wouldn't tell anybody about them if they just took the vehicle and didn't hurt her (T1036). Lewis was going to kill her but said he wouldn't (T1036). Lewis and Eric had her sit at the base of a tree and lean her head forward; then Lewis shot her in the head three times with the .22 (T1037). They found a few dollars, the car keys, and continued on towards

California (T1037).

Regarding the Ohio murder, Becker said Lewis told him that he and Eric walked along a set of railroad tracks as they left Newcomerstown, Ohio (T1039). Through an open garage door, they saw a red vehicle that they could use for transportation (T1039). They knocked at the rear of the house; nobody answered, and they kicked in the back door (T1039). They had been in the house for ten minutes looking for the car keys when they noticed a lady who said, "Who's there?" (T1040). Eric gave his gun to Lewis and tied the woman's hands behind her back (T1040). After finding the keys and about $40, they put the lady in the trunk of the car and left (T1040). Having decided to kill the lady so she could not identify them, they stopped in a wooded area out of town; Lewis shot the lady three times in the head (T1041). Becker said Lewis stated the lady had said she was dying from cancer: "she was going to die anyway, and he also kind of seemed to justify that to himself, that she was going to die anyway" (T1042). Lewis told Becker he had bad dreams about what happened (T1043).

The prejudice was compounded when the state commented, in closing argument, on Lewis' exercise of his rights during Becker's interrogation:

> '[Prosecutor:] It is not the case that all the evidence is that Eric Elliott shot the Brewers. We don't know that. You know, the defendant had an opportunity with Daniel Becker. ...
>
> He didn't say "I didn't kill them." He could have.
>
> He didn't say, "I didn't do it." There's four words that would have been completely different from what he said to Daniel Becker.

You remember what he said to Daniel Becker?

"Either you killed these people out of self-defense or some justifiable reason or you're just a cold-blooded killer, you and him. Which is it?"

"One or the other. One of them."

Becker, trying to see if he'll say something: "Well, stuff happens." You wouldn't understand. We did this out of craziness. You wouldn't understand it.

"Did you and your friend kill somebody in Missouri?"

"You guys are going to find out that all -- some stuff anyway. You guys got the gun. You guys can match the bullet to the gun."

How easy this would have been. If this were the truth, this is what he would have said.

He was trying to fool Daniel Becker back in September of 1994, ladies and gentlemen. And he was trying to fool you today.

"And did you do it?"

"I don't deny it, but I don't admit it either."

[The trial court sustains defense counsel's objection to that last exchange and instructs the jury to disregard.]

[Prosecutor]: "Are you solely responsible for these murders?" Becker asked him.

Did he say, "I didn't do it"? No...'

(T997-99).

'He was trying to fool Becker back in '94 and he's trying to fool you.

"Next question" he'd say to Becker.

"I don't remember Missouri." He would disagree.'

(T1001).

At penalty phase, the prosecutor referred more than once to Lewis' statements in arguing that the state had proved the aggravating circumstances:

"'Remember Becker's statement, what he told Sergeant Becker...?"

"What other statement do we know he made that tells the tale that the two are connected?"'

(T1285).

"And the defendant, by his own statement, says that he shot [Ruth Loader] out in a wooded area..."

(T1289).

'So I don't know exactly what happened. But by his own statement, when they went to the Brewers, he says, "That's when we decided to kill them." It was a joint venture. "It was a 50/50[24] deal." His own words.

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[24] The "50/50" statement, which appears only in Becker's report, and not on the tape, does not specify whether the reference is to all the offenses, or only some of the offenses, or whether it includes the Missouri offenses (StMtnEx 1). According to Becker, Lewis used "50/50" to mean that he and Eric were equally responsible. Becker did not explain -- in his report or in his testimony -- what he meant by being "responsible" for the murders and his report contains no clarification of what Lewis may have meant (StMtnEx1).

Why did Roxy Ruddell say what she told them? She made it pretty clear she was hoping that they wouldn't sexually assault her. I think that's what the implication is, isn't it? That was just an excuse he used to try and justify his killing...'

(T1305).

The foregoing excerpts from the record show that Becker's testimony concerning Lewis' statements about the offenses in Missouri was crucial to the state's case against Lewis at guilt phase. No physical evidence at the Brewers' house linked Lewis to being in the house or to shooting the Brewers, although Eric Elliott's footprints were found on the porch of the house and only Elliott's prints were found on the .22 and the other weapons (T648-54,815,818,897-905; DefEx'sB,C,D,E,F,G,H). Without Lewis' statements, the state had no evidence that so much as "put" Lewis in the Brewers' house.

Likewise, Lewis' statements, again admitted through Becker, were critical at penalty phase to prove the aggravating evidence of the Ohio and Oklahoma murders (1031-42). This was evidence that the state relied on in arguing that it was really Lewis who shot the Brewers:

And the defendant says, "I shot Roxy Ruddell."

He said, "Oh, but it's Eric Elliot who shot the Brewers."

Maybe it was. Maybe it wasn't. I don't know...."

(T1290).

Lewis' own statements comprised evidence that the state used to argue that Lewis was "the worst of the worst" and worthy of death:

How many people do you have to kill? You know, if you take the principle that counsel was just announcing here, that you should reserve the worst penalty for just the worst criminal... Well, I don't know who that person might be, there's one of them in this state...

Eric Elliott brought the gun from home. That's true. But who had it when they killed Mrs. Logan?

By his own statement, he did.

Who had the gun when he killed, when they killed Ms. Ruddell down in Oklahoma?

He did, by his own statement.

(T1303).

There is simply no way this evidence can be considered harmless at either stage of trial. The state presented it, relied on it, and argued it, precisely because it was powerful, prejudicial evidentiary ammunition for verdicts of first degree murder and sentences of death. The state ***needed*** this evidence to convince the jury that Lewis was guilty of first degree murder.

But it was evidence that should have been suppressed and excluded. Allowing the state to admit and use this evidence -- Lewis' statements and his invocation of his rights to silence and non incrimination -- was prejudicial, reversible error and a manifest injustice. For all the foregoing reasons, the cause must be reversed and remanded for a new trial.

As to Point Seven: The trial court erred in overruling Lewis' motion for a mistrial made when the assistant attorney general, in his penalty phase opening statement declared: "what we're dealing with here is a serial killer." This violated Lewis' rights to due process of law, fair jury trial, freedom from cruel and unusual punishment and reliable sentencing. U.S.Const.,Amend's V, VI, VIII, and XIV; Mo.Const.,Art. I, §§10, 14, 18(a), and 21. The court's "remedy" of merely telling the jury to disregard the statement was not adequate, and Lewis was prejudiced. This was a veteran prosecutor -- assisting precisely because he was experienced in death penalty cases -- who certainly knew that making this kind of argument in an opening statement was prohibited and would prejudice the jury against Lewis. The timing of the argument enhanced its prejudicial impact: it hit the jury at the very beginning of penalty phase when, for the first time, the state revealed to the jury what facts -- "evidence" -- the state maintained warranted the death penalty. At this opening stage of the penalty trial, the jury would view the assistant attorney general's assertion that Lewis was a serial killer as "fact" and would not, despite the court's instruction, be able to disregard such a statement. The prejudicial force of this statement on the jury is demonstrated further by an article published in The Columbia Daily Tribune after the jury returned verdicts of death; of the entire penalty phase, the article mentioned only two statements made by the assistant attorney general: that the defense experts' testimony was "psychobabble" and that Lewis was a "serial killer." The prejudice caused by this error, and the likelihood that if this Court does not correct the assistant attorney general's improper

argument the state will make similar arguments in the future, require that Lewis' sentences of death be vacated and he be re-sentenced to life imprisonment without probation or parole or, in the alternative, that the cause be remanded for a new penalty phase proceeding.

In his penalty phase opening statement, the assistant attorney general outlined the evidence the state would present: defendant's confession to murders in Ohio and Oklahoma (T1019), auto thefts, "breaking and entering in Ohio," and "child endangering" of his own child (T1021). Then he said, "So, ladies and gentlemen, I think it will be very clear, when you hear all of this evidence, that what we're dealing with here is a serial killer."

Defense counsel immediately objected:

Mr. Wolfrum [Defense counsel]: Judge, I object. And that's --

The Court: Objection will be sustained.

Mr. Wolfrum: That's improper and I ask the jury be instructed to disregard that.

The Court: The jury will disregard.

Mr. Wolfrum: Judge, request a mistrial on the basis of that statement.

The Court: That will be overruled.

(T1021). Defense counsel preserved this point for appellate review by including it in the motion for new trial (LF 310-12, 321-22). This court reviews the trial court's denial of a mistrial for abuse of discretion. ***State v. Thompson***, 68 S.W.3d 393, 395 (Mo.banc 2002).

"The primary purpose of an opening statement is to inform the judge and jury of the

general nature of the case, so they may appreciate the significance of the evidence as it is presented." ***Id***., 68 S.W.3d at 394. "[A]rgument is improper." ***Id***.

Instruction 26 -- read to the jury just before the assistant attorney general made his opening statement -- informed the jury that the attorneys' opening statements would "outlin[e] any additional evidence to be presented" (T1019; LF 221). The attorney general himself told the jury that his statement would describe "the evidence in this phase of the trial" (T1019). Based on the instruction and the assistant attorney general's comment, the jury would have no reason to view the "serial killer" statement as anything other than fact. Not even the trial court's cursory "[t]he jury will disregard," advised the jury that the "serial killer" statement should not be viewed as a description of fact.

Only the final paragraph of Instruction 2, "[t]he opening statements of attorneys are not evidence" hinted that the jury should not view the prosecutor's comment as fact; opening statements are, of course, based on facts. But Instruction 2 was not read to the jury before or after the penalty phase opening statements (T 1018-19) or closing arguments (T1278, 1283). Ten hours after the "serial killer" comment was made, (T1018, 1310) Instruction 2 and other written instructions were given to the jury when they retired to deliberate at penalty phase (T1278, 1283, LF 197). What were the chances that the jury, at that point, would connect the "serial killer" statement with this instruction and realize that they could not treat what the prosecutor had told them as fact?

Although appellant knows of no statute in Missouri that defines the term "serial killer" or that makes being a "serial killer" an aggravating factor, it is fair to say that the term bespeaks "the worst of the worst." This Court has previously condemned *argument*

comparing a defendant to - or labeling a defendant as - a serial killer absent such proof:

> The terms "mass murderer" and "serial killer" are pejorative names associated with a small ghoulish class of homicidal sociopaths who repeatedly and cruelly murder for no apparent motive [other] than to satisfy a perverse desire to kill or cause pain. No evidence suggests that the defendant's prior homicides were of this character. The use of these words is name calling designed to inflame passions of jurors. Comments designed solely to inflame jurors against the defendant by associating him with heinous crimes not in the record is always error, although not always reversible error.

State v. Whitfield, 837 S.W.2d 503, 513 (Mo.banc1992). The same reasons for condemning such comments in closing arguments apply with equal force to condemning them in opening statements.

Indeed most people - including judges, jurors, prosecutors, and defense attorneys -- consider serial killers as setting the standard for the "worst of the worst." *See, e.g.,* ***Id.***; ***People v. Carpenter,*** 21 Cal.4th 1016, 1064, 988 P.2d 531, 562, (Cal.1999) (rejecting defendant's argument that California's death penalty law "fail[ed] to narrow adequately the class of offenders eligible for the death penalty," appellate court said that "defendant, a serial killer**,** would be death-eligible under almost any reasonable narrowing scheme"); ***State v. Papasavvas*****,** 163 N.J. 565, 599-600, 751 A.2d 40, 58-59 (N.J.2000) (judge determined that prospective juror was not qualified based, primarily, on the juror's statement that he would not sentence a serial killer to death); ***Miles v. State***, 365 Md. 488, 566-67, 781 A.2d 787, 832-33 (Md.2001) (juror opposed to the death penalty "for

anybody" excepted "serial killers" whom she could sentence to death); ***State v. Jones***, 197 Ariz. 290, 306, 4 P.3d 345, 361 (Ariz.2000) (prosecutor argued that defendant's "politeness" did not mean that he could not be a killer because even "serial murderers" Ted Bundy and John Wayne Gacy "were very polite"); ***People v. Mendoza,*** 24 Cal.4th 130, 188, 6 P.3d 150, 185-86 (Cal.2000) (Defense counsel, to support his argument that defendant should not be sentenced to death, argued that even some "serial killers" had not received the death penalty).

The state never presented, never attempted to present, any evidence to establish that Lewis was a serial killer. *See*, ***State v. Multaler***, 252 Wis.2d 54, 68, 643 N.W.2d 437, 444 (Wis.2002) (describing traits of serial killers).[25] The state's argument that Lewis was

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[25] "'[S]erial homicide offenders often do all of the following:

> take clothing, jewelry and other property such as photo's [sic], identification and other personal items from their victims. These items are used by the offender to relive and recapture the moment of the homicide event, where often times the offender feels that he now possesses the victim. These items are used by the offender to fuel his fantasies and confirm the victim possession until the fantasy is no longer enough, such that he has to go out and find another victim.
>
> ... keep newspaper clippings about the death and subsequent police investigation of his [sic] victims. These items also help the offender in his fantasies, and act as proof and reminders of his act.
>
> ... keep written documentation such as diaries for the reasons detailed

a serial killer was a blatant and knowing ploy by an experienced prosecutor, unsupported by evidence, to prejudice the jury against the defendant. The assistant attorney general in this case had been representing the state in various capacities in criminal matters for many years. *See, e.g.,* ***State v. Christeson***, 50 S.W.3d 251, 264 (Mo.banc2001); ***State ex rel Davis v. Shinn***, 874 S.W.2d 403, 404 (Mo.App.W.D. 1994); ***State v. Bailey***, 745 S.W.2d 832, 834 (Mo.App.E.D.1988); ***State v. Tremaine***, 646 S.W.2d 384 (Mo.App.W.D.1983).

When "an experienced prosecutor" commits error, the Courts may reasonably find that the prosecutor did so deliberately knowing that he would thereby arouse the jury's passions and prejudice the defendant. In ***State v. Beck,*** 745 S.W.2d 205 (Mo.App.E.D.1987), denouncing the tactics of the "experienced prosecutor" in implying that the defendant was guilty of an offense greater than the one charged, the Eastern District stated,

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> above.
>
> ... take photographs, as well as audio and video recordings of their victims.
>
> ... keep these items ... even under intense police investigation. The need to keep these items as reminders and fantasy tools outweighs the risk of being caught by possessing such incriminating evidence.
>
> ... often times interject themselves into the investigation and or taunt investigators.'"

We are considering not the inadvertent, volunteered statement of a witness. Instead we have an experienced prosecutor deliberately and calculatingly eliciting testimony that the defendant was guilty of a crime more serious and more inflammatory than the charged offense. The principle laid down by our Supreme Court 35 years ago in ***State v. Allen***, 251 S.W.2d 659, 662, 363 Mo. 467, 473 (Mo. 1952), continues to be a fundamental rule of due process today.

> 'In the trial of a criminal case, the circuit attorney occupies a quasi- judicial position. While it is his duty vigorously and fearlessly to prosecute in behalf of the State, yet he is also chargeable with the duty to see that the defendant gets a fair trial and he must not knowingly prejudice the right of the defendant to a fair trial by injecting into the case prejudicial and incompetent matters.
>
> ....
>
> However, it makes no difference how regular trial proceedings are or how strenuously the trial court may strive to keep them regular or to cure error committed, yet, if prejudice finds its way into the verdict, the verdict cannot stand.
>
> ....
>
> However guilty any defendant may be, the law of this State requires that he shall be punished only after having been accorded a fair trial. This, we are convinced, the defendant in this case did not have.'

745 S.W.2d at 209. *See also,* ***State v. Goodson***, 690 S.W.2d 155, 160-61 (Mo.App.E.D.1985); ***State v. Browner***, 587 S.W.2d 948 (Mo.App.E.D.1979).

Missouri courts are not alone in censuring unwarranted prejudicial comments comparing the defendant to a serial killer. In ***Allen v. State,*** 659 So.2d 135 (Ala.Cr.App.1994), the Court condemned the prosecutor's comments encouraging the jury to compare the defendant to serial killer Jeffrey Dahmer absent any evidence supporting such comparison:

> Jeffrey Dahmer is an infamous serial killer who distinguished himself by consuming the flesh of some of his victims. We find the prosecutor's remark in this case unwarranted. ... "The use of such tactics by representatives of the State can seriously affect the fairness, integrity, and public reputation of judicial proceedings. This type of rhetoric by prosecutors has 'no place in the administration of justice and should neither be permitted nor rewarded.' ***United States v. Young***, 470 U.S. 1, 26 (1985). Such behavior deserves 'stern and unqualified judicial condemnation.' ***Id***. at 28.

659 So.2d at 143 *quoting* ***Sattari v. State***, 577 So.2d 535, 537 (Ala.Cr.App.1990); *see also*, ***Kelly v. South Carolina***, 534 U.S. 246, 122 S.Ct. 726, 732-33 (2002) (prosecutor's comparison of defendant to a serial killer 'invited' jury 'to infer that [defendant] is a "vicious predator who would pose a continuing threat to the community"'). The foregoing cases explain how prejudice ensues: to convince a jury that the defendant is the "worst of the worst" and worthy of death, a prosecutor argues that the defendant is a serial killer.

The prejudicial effect of this statement on the jury in the present case is demonstrated further by an article published in The Columbia Daily Tribune after the jury returned

verdicts of death and in which, of the entire penalty phase argument, only two statements made by the assistant attorney general were mentioned: the arguments that the defense experts' testimony was "psychobabble" and that Lewis was a "serial killer" (T1303; LF 321).

The effect of the attorney general's "serial killer" comment at the outset of penalty phase cannot be discounted or disregarded as harmless error. First, the circumstances of error at guilt phase and penalty phase are very different. At guilt phase, error may be harmless when evidence of guilt is overwhelming. But at the penalty phase, such analysis does not suffice because it does not account for the fact that a jury need never return a verdict of death - even if there is "overwhelming" aggravating evidence. For any reason, or no reason at all, a jury may decide, at the ultimate point, to reject a sentence of death. Truly, there simply is no such thing as harmless error at penalty phase.

But, assuming for purposes of argument that harmless error analysis is appropriate at penalty phase, one must then ask why the prosecutor would resort to such comments. If the prosecutor has "overwhelming" aggravating evidence, what need is there to inject such prejudice?

Here, the record suggests that the case for death was not "overwhelming." Even with the "serial killer" comment, the jury deliberated for five hours at penalty phase before returning verdicts of death (T1310, 1313). Notwithstanding the assistant attorney general's degradation of the defense penalty phase evidence as "psychobabble," there was considerable mitigating evidence from lay and expert witnesses (T1103-1276).

For these reasons, even under a harmless error analysis, the serial killer remark

infected the proceedings with prejudice and denied Lewis a fair penalty phase trial. The sentences of death must be vacated and Lewis re-sentenced to life imprisonment without probation or parole or, in the alternative, the cause must be remanded for a new penalty phase trial.

<u>As to Point Eight</u>: The trial court erred in overruling Lewis' motion for relief from his unlawful extradition from Oklahoma to Missouri, refusing to order that Lewis be returned to Oklahoma, and proceeding to trial over his objections. This violated Lewis' rights to due process of law, access to the courts, due process of law, equal protection of the law, fundamental fairness, freedom from cruel and unusual punishment, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, and XIV, Mo.Const., Art. I, §§2, 10, 14, 18(a), and 21. It also violated Chapter 22, §§1141.1-1141.30, Oklahoma Statutes. Lewis was prejudiced in that the state was allowed to benefit from its own illegal action of wrongful extradition; had the state been required to follow the law, Lewis might never have been brought to Missouri, convicted, and sentenced to death.

Prior to trial, Lewis filed a motion asking the trial court to transport him back to Oklahoma because he had been brought from there to Missouri illegally (LF179-86). Specifically, Lewis alleged violations of Chapter 22, Oklahoma Statutes, §§1141.1-.30, Federal Rules of Appellate Procedure, Rule 23, and United States Supreme Court Rule 36; Lewis also alleged that the courts of Missouri had no jurisdiction over him because he had been brought unlawfully to Missouri (LF179-80). Lewis requested by way of relief that the trial court order: 1) it lacked jurisdiction, 2) Lewis be transported back to Oklahoma, 3) the state of Missouri be prohibited from using as evidence crimes or evidence of crimes allegedly occurring in Oklahoma that were the subject of Lewis' habeas corpus proceeding pending in federal court, and 4) the Missouri proceedings be stayed until final disposition of Lewis' federal habeas action in Oklahoma (LF179-86).

The trial court heard evidence on the motion and denied it (T185-89). The defense preserved this ruling for appellate review by including it in the motion for new trial (LF283-89).

United States Supreme Court Rule 36 states: "Pending review in this Court of a decision in a habeas proceeding commenced before a court, justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule." That rule vests the authority to allow transfer in a federal judge. Rule 23 of the Federal Rules of Appellate Procedure contains similar requirements.

The Uniform Criminal Extradition Act, enacted in Oklahoma as 22 Oklahoma Statutes, §§1141.1 to 1141.30, states, at 22 Oklahoma Statutes, §1141.10, "Any person who is arrested within this state, by virtue of a warrant issued by the Governor of this state, upon a requisition of the Governor of any other state or territory, as a fugitive from justice under the laws of the United States, shall not be delivered to the agent of such state or territory until notified of the demand made for his surrender, and given twenty-four hours to make demand for counsel; and should such demand be made for the purpose of suing out a writ of habeas corpus, the prisoner shall be forthwith taken to the nearest judge of the district court, and ample time given to sue out such writ, such time to be determined by the said judge of the district court." *See* §548.101 (Missouri's comparable requirement of notice, appearance before a judge, and an opportunity to demand and procure counsel to challenge extradition). Chapter 22, Oklahoma Statutes, §1141.11, states that "Any officer who shall deliver to the agent for extradition of the

demanding state a person in his custody under the Governor's warrant, in willful disobedience to the last section [i.e., 1141.10, cited above], shall be guilty of a misdemeanor and, on conviction, shall be fined not more than Five Hundred Dollars ($500.00) or be imprisoned not more than six months, or both." *See* §548.111 (violation of §548.101 is a misdemeanor punishable by no more than six months imprisonment, $1000.00 fine, or both).

Evidence introduced by the defense at the hearing on the motion showed that Lewis was removed from Oklahoma and brought to Missouri illegally. In September, 2000, Lewis was in prison in Oklahoma having been sentenced to death in state court in Oklahoma in the case of State v. Lewis Eugene Gilbert, CF-94-1125 (T187; DefExA). Lewis' federal habeas corpus petition, seeking relief from his Oklahoma conviction and death sentence, was then pending having been filed in the federal district court for the Western District Court of Oklahoma on September 17, 1999 (T187; DefExA).

The defense introduced an exemplified, certified, and attested, and authenticated copy of the federal district court file in Lewis' habeas case; the file contains no mention or notice concerning Lewis' removal from Oklahoma (DefExA). Yet, on or about September 25 or 26, 2000, without prior notice, without being taken before a judge, and without being told where he was going or why, Lewis was taken from Oklahoma and brought to Missouri (T188-89). At that time, Lewis was represented by counsel who was not notified of either plans for his removal from the State of Oklahoma or his removal from the State of Oklahoma (DefExA). Nor was the plan, the intent, or Lewis' actual removal from Oklahoma to Missouri brought to the attention of the federal judge before

whom Lewis' federal habeas corpus petition was then pending (DefExA). Nor was there any evidence showing that prior to his removal from the State of Oklahoma, Lewis was brought before a state judicial official to be advised of his rights concerning his removal from Oklahoma and to counsel. There was no evidence that Lewis waived extradition or was he advised at any time that an effort was afoot to remove him to the State of Missouri.

Lewis' removal from Oklahoma was apparently effected by an "Executive Agreement" between the governors of Oklahoma and Missouri (LF266-71). Although §548.051 provides for such agreements, this statutory section does not do away with other requirements of the Uniform Criminal Extradition Law. The states must still comply with the statutes, and in this case they did not do so.

To summarize, the extradition laws of Oklahoma and Missouri prohibit removal of an individual in the way that Lewis was removed from Oklahoma and make such removal a criminal offense. Likewise, the United States Supreme Court Rules and the federal appellate rules also prohibit the states of Missouri and Oklahoma in acting as they did to remove Lewis from Oklahoma and take him to Missouri. Thus, in removing Lewis from Oklahoma and taking him to Missouri, the state of Missouri acted illegally and prejudiced Lewis.

Lewis' removal from Oklahoma in violation of the above-cited laws and rules deprived both him and a federal judge of rights that they had under the law. It may also have provided certain strategic benefits to the states of Oklahoma and Missouri. By removing Lewis from Oklahoma without notice to the federal judge hearing his federal

habeas corpus petition, and without providing him his statutory and Sixth and Fourteenth Amendment rights to notice, counsel and access to the courts, Missouri deprived the federal judge of the right to rule on his pending federal habeas corpus petition prior to his removal. It is conceivable that if the judge had been notified of the intent to remove Lewis, he might have prohibited such removal. Allowing Missouri to remove Lewis from Oklahoma without notice to the federal judge before whom Lewis' habeas corpus action was pending, and to proceed to trial without that judge's knowledge of Lewis' improper removal, enables Missouri to use in aggravation a conviction that that the federal court of appeals may ultimately set aside. The manner of removal from Oklahoma left a federal judge in the dark as to Lewis' location and the possibility that a conviction under attack in his court might be used as aggravation in another state before that judge was able to rule upon the validity of the conviction. There was a strategic benefit to the state of Missouri in the manner in which Lewis was removed from Oklahoma, including the secrecy with which the proceedings to remove him were conducted. Because the state was allowed to use the Oklahoma conviction under attack in those proceedings, the State of Missouri benefited directly from the violation of the statute.

The trial court's refusal to sustain this motion, resulted in the violation of defendant's rights to access to the courts, due process of law, fundamental fairness, freedom from cruel and unusual punishment, his right to counsel and effective counsel, equal protection of the laws, all protected by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. For the foregoing reasons, the trial court erred in denying the relief

requested, *i.e.*, ordering that Lewis be transported back to the state of Oklahoma so he could pursue remedies available to him under Chapter 22, Oklahoma Statutes, Sections 1141.1 to 1141.30, and, further, pursue his avenues of relief in federal court.

Allowing the State of Missouri to proceed to trial prior to completion of his appeal allowed Missouri to benefit from the unlawful removal of the defendant from the State of Oklahoma made without notice to the federal judge before whom his habeas corpus petition was pending. The state cannot be allowed to benefit from its own illegal procedures. ***State v. Nenninger***, 188 S.W.2d 56, 59 (Mo.1945) ("A party to a lawsuit will not be permitted to take advantage of error of his own making"). Imposing a sentence of death where the state has obtained jurisdiction by improper methods is an absolute violation of the defendant's rights to due process of law and constitutes cruel and unusual punishment. It also violates fundamental fairness and the structural framework of the trial in that the state avoided the rules of the justice system and took the law into its own hands to obtain defendant's presence in Missouri and to obtain a sentence of death against defendant. For these reasons, Lewis' convictions and sentences must be set aside and the cause remanded to the trial court with directions that Lewis be returned to Oklahoma.

Conclusion

Wherefore, for the foregoing reasons, appellant respectfully requests that the Court reverse the judgment and sentences and remand for a new trial, or, in the alternative, for a new penalty phase trial.

Respectfully submitted,

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Deborah B. Wafer, Mo. Bar No. 29351
Attorney for Appellant
1221 Locust Street; Suite 410
St. Louis, Missouri 63103
(314) 340-7662 - Telephone
(314) 340-7666 - Facsimile

CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's 84.06(b). The brief comprises 30,770 words according to Microsoft word count.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, this ___ day of _____, 2002, to the Office of the Attorney General, P.O.Box 899, Jefferson City, Missouri 65102

_____
Attorney for Appellant